1983 Compilation of the Superintendent of Public Instruction's

DECISIONS AND ORDERS

Volume III

Legal Services Division
Office of Public Instruction
Ed Argenbright, Superintendent
State Capitol
Helena, Montana 59620

INTRODUCTION

Volume III of the Decisions and Orders of the State Superintendent of Public Instruction contains decisions filed in 1983. These decisions are legal orders which set precedent for all Montana school districts. An index which identifies the subject and topic matters of each opinion is provided at the front of the volume, and the cumulative index located at the end of the book contains the opinions to be found in Volumes I (1981) and II (1982).

These opinions are published to assist school districts in dealing with legal controversies and to provide guidelines for preventing unnecessary litigation.

Volumes I and II are available from the Legal Services Department of the Office of Public Instruction.

Ed Argenbright
State Superintendent of Public Instruction
State Capitol
Helena, Montana 59620

1-800-332-3402

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BEFORE THE STATE OF MONTANA
SUPERINTENDENT OF PUBLIC INSTRUCTION
****

MARY ANN KNUDSEN, Appellant, -vs.- VALLEY COUNTY SCHOOL DISTRICT #1-1A, Respondent.	)	OSPI 40-83
	)	DECISION AND ORDER

****

This is an appeal from the findings of facts, conclusions of law and order rendered by the Valley County Superintendent of Schools. The appeal is taken by Mary Ann Knudsen, Appellant, a tenured teacher in Valley County School District #1-1A, Respondent, Glasgow, Montana. Appellant appealed the Respondent trustee's decision denying her claim for paid sick leave during the winter of 1982. The hearing was held on December 10, 1982. The Valley County Attorney was also present as the County Superintendent's legal advisor. Both parties were represented by counsel in the matter. The Valley County Superintendent of Schools rendered findings of facts, conclusions of law and an order affirming the decision of the Respondent Board of Trustees. Appellant filed a Notice of Appeal to this State Superintendent on March 11, 1983.

Appellant presents several issues for review by this State Superintendent as discussed in the Notice of Appeal.

1. Whether the County Superintendent's decision was made upon unlawful procedure because she refused to provide a copy of the transcript to Appellant or her counsel.
2. Whether the County Superintendent's decision was clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.
3. Whether the County Superintendent's statement in finding number two that no copy of the 1981-82 agreement was available to be admitted as an exhibit was both untrue and irrelevant.

4. The County Superintendent found that the School Board had granted the Appellant an extended leave in February (Finding number six). Appellant contends she was never notified in writing that she had been granted an extended leave. Appellant was paid her full salary every month, so she assumed she had been granted paid sick leave. Appellant argues that findings number seven and eight do not accurately set forth the contents of letters which are marked as exhibits in the case.

5. Appellant contends that finding number nine which states that Appellant was advised that the evidence submitted was insufficient is erroneous. Appellant contends that she was not timely so notified. Had Appellant been told immediately that the Board was not satisfied with her letters, she could have provided additional substantiation. Appellant contends she asked for sick leave on February 3, 1982, including a letter from a Doctor Leonard Klassen. Appellant contends that it was not until March 11, 1982, that the administration asked for additional information. Appellant contends she sent two letters on March 6, 1982, and that it was not until late April that the administration told her that the trustees were still not satisfied.

6. Appellant argues that the County Superintendent ignored the testimony of Appellant and her supporting witnesses all of whom testified as to her personal, physical and emotional condition during the winter and spring of 1982.

7. The Appellant contends the County Superintendent has ignored the testimony of Appellant's personal physician, Dr. Leonard Klassen, that she was in no condition to teach youngsters. Appellant contends that the decision was arbitrary and capricious or characterized by abuse of discretion.

This State Superintendent finds issues numbers 4, 5, and 7 to be dispositive of this case and will address the same.

Appellant is a tenured teacher employed by Respondent School District. Appellant teaches first grade in the Irle School and has been employed by the School District for twenty years.

During the academic year 1981-82, there existed a collective bargaining agreement between Glasgow School District #1 and 1A of Valley County and the Glasgow Education Association. Said contract was binding as to the relationship between the parties in this matter. The contract provided for the following leaves relevant to this matter:

(a) Sick Leave: 15.3

> Ten days annually at full salary will be provided each teacher for personal, physical or mental illness or disability. The District will provide a substitute (when needed).
>
> 15.4
>
> Ten days of sick leave will be available for use from starting date of first contract.
>
> 15.6
>
> Unused days of leave accumulate to 100 days.
>
> 15.7
>
> Doctors report -- absences beyond three days may require a doctor's verification.

15.8

A record of the accumulation and use of sick leave is available in the clerk's office. (Emphasis supplied)

Appellant requested and obtained a variety of leaves, due to her husband's critical illness. Her husband's condition was designated cancer, and he was repeatedly under observation and treatment of cancer by Montana hospitals and Johns Hopkins Hospital, Baltimore, Maryland. Respondent believed that Appellant was requesting leave in order to be with her husband. Appellant contends she was aware of the provision and requested sick leave because she was physically and emotionally unable to teach her class of first graders, meeting the leave requirements of the collective bargaining agreement. She contends that she came within the collective bargaining agreement provisions for taking sick leave.

During the winter of 1982, Appellant requested paid sick leave. The district provided no immediate written response to her request and continued to pay her a regular monthly salary. When she received her final paycheck for the 1981-82 year in late May 1982, Appellant discovered Respondent had deducted $4,563.00 for 36.5 days at $125.00 per day. Respondent claimed that the days were unpaid extended leave, not paid sick leave. Appellant contends that this was the first formal written knowledge she had received that her request for sick leave had been denied. She appealed to Respondent Trustees who denied her claim for paid sick leave. Appellant later appealed to the County Superintendent of Schools.

During the academic year 1981-82, Appellant was absent 60.5 days of the 180 teacher instruction days. All of said absences, as found by the County Superintendent, corresponded to those times when the Appellant's husband was out of town for medical treatment or was under medical treatment which was for the full year of 1981-82.

The County Superintendent found that Appellant requested emergency leave and personal leave to cover the 8½ days of absence in January of 1982. Appellant was granted the 2-day remainder of her emergency leave, and her personal leave which was 3 days; the remaining 3½ days were granted to her as an extended leave. The County Superintendent found that such granting of leave was proper.

The County Superintendent found that on February 3, 1982, Appellant requested sick leave to take her husband to Johns Hopkins Research Center for reevaluation of the cancer diagnosis and possible treatment. Appellant contends that she requested sick leave for her own personal illness because she was physically and emotionally unable to teach her class of first graders. Such request was accompanied by a letter from Dr. Leonard Klassen, MD. The County Superintendent's finding indicated that the request for the February 3, 1982 leave was for her husband's benefit. Joint Exhibit #2, Dr. Klassen's letter of February 3, 1982, submitted without objection of either party stated, "it will be to her benefit to be with him to prevent severe emotional distress on her part." The County Superintendent did not give weight to the remainder of the letter in terms of school board request for doctor verification for her request of sick leave.

Testimony is unclear as to what occurred next. Appellant contends that the Board of Trustees and the District Superintendent allowed Appellant to assume she had properly complied with the School Board's request. On March 11, 1982, the District Superintendent once again asked Appellant for additional documentation as is provided for in Joint Exhibit #3. Appellant provided that additional documentation once again and sent a letter from a Dr. Eva Zinreich at Johns Hopkins Hospital on March 16, 1982. The letter indicated "if she does not participate in Mr. Knudsen's treatment and care here in Baltimore, she would most certainly be preoccupied at home, and she would be unable to carry on her occupation to the best of her

ability." On March 16, 1982 the Appellant also submitted a letter from a clinical social worker from Johns Hopkins University.

The County Superintendent made finding #9, that Appellant was advised that the evidence submitted was insufficient; however the County Superintendent failed to specify what date the Respondent Board of Trustees came to that conclusion. The Board requested that additional evidence be presented to support her personal illness or disability.

Appellant requested additional evidence from her family physican, Dr. Leonard Klassen. Following a medical examination, Dr. Klassen wrote a letter on April 27, 1982, admitted into evidence as Joint Exhibit #4 without objection. Dr. Klassen's recommendation was that she not teach until some obvious improvement in her condition was noted. The School Board on April 28, 1982, granted Appellant's request for sick leave for the remainder of the school year.

In May 1982, Appellant requested that the 36½ days of extended leave which was given without pay be treated as sick leave and that she be reimbursed for those 36½ days. Her salary was $23,375.00. The total amount of the request was $4,562.50. Respondent Board refused to grant this request because of inadequate medical verification of personal illness or disability as required by the collective bargaining agreement prior to the April 28, 1982 letter. Such inadequate medical verification included the second letter from Dr. Leonard Klassen.

The County Superintendent found that Appellant did in fact teach during the time period from January 22 through the end of year, in that she taught for 26 days between February 1 and May 18. Appellant taught February 1 through 11th; February 22 through 26; March 1, 2, 3 and 8. Appellant again returned to the classroom April 19 through 28. April 27 was the date of examination by Dr. Klassen.

The County Superintendent found that insufficient factual evidence was presented to show that she was suffering from personal, physical and mental illness or disability as required by the collective bargaining agreement. The County Superintendent further found that insufficient medical verification was present to show a personal illness or disability on the part of the Appellant for a period of time prior to April 27, 1982 and that the School Board properly granted extended leave for the 36½ days in question.

This State Superintendent has adopted the Standards of Review as set forth in Section 10.6.125, Administrative Rules of Montana. That Standard of Review provides:

> 10.6.125 APPELLATE PROCEDURE - STANDARD OF REVIEW
> (1) The state superintendent of public instruction may use the standard of review as set forth below and shall be confined to the record unless otherwise decided.
> (2) In cases of alleged irregularities in procedure before the county superintendent not shown on the record, proof thereof may be taken by the state superintendent.
> (3) Upon request, the state superintendent shall hear oral arguments and receive written briefs.
> (4) The state superintendent may not substitute his judgment for that of the county superintendent as to the weight of the evidence on questions of fact. The state superintendent may affirm the decision of the county superintendent or remand the case for further proceedings or refuse to accept the appeal on the grounds that the state superintendent fails to retain proper jurisdiction on the matter. The state superintendent may reverse or modify the decision if substantial rights of the Appellant have been prejudiced because the findings of fact, conclusions of law and order are:
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record;
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(g) because findings of fact upon issues essential to the decision were not made although requested.

Appellant contends that the evidence in the record clearly establishes the fact that Mary Ann Knudsen was ill, that she obtained proper verification of the illness from her family physician, and satisfied the collective bargaining agreement.

This State Superintendent has narrowed the issue on appeal to the evidence to determine if Appellant was physically and emotionally unable to teach, thereby fulfilling the requirements of the definition of the collective bargaining agreement and whether in fact the County Superintendent erred in making a finding that such verification was not sufficient or timely made within the confines of the above Standards of Review.

Appellant contends that the agreement states that an absence of more than three days "may" require a doctor's verification. Appellant contends that it is the Respondent's obligation to inform Appellant if it was not satisified with her medical verification. Appellant further contends that because she was not told until she received her final paycheck after her recovery that she had not been granted sick leave, she had to depend upon the testimony of her friends as well as that of her own physican, Dr. Leonard Klassen, at the hearing.

This State Superintendent has said that he will not substitute his judgment upon the weight of the evidence as the record clearly indicates that there was probative, substantial evidence of findings otherwise. See Pryor Public School District #2 & 3, Pryor, Montana v. Bruce R. Younguist, OSPI #42-83, Kisling v. School District No. 2A(C), Phillips County, OSPI #14-81, and School District #9, Lewis & Clark County v. Mr. and Mrs. William Weidbusch, OSPI 38-83.

From a complete reading of the transcripts and the exhibits provided, this State Superintendent was struck immediately with the historical nature and the testimony

provided by witnesses of both parties as to the nature of this case. The testimony revealed that Appellant was very close to her husband. The testimony was confirmed that she had successfully taught for twenty years at that school district. The record indicates that Appellant suffered sleepless nights, walked the floors, was troubled, was very agitated and full of anxiety. The physical symptoms listed on the 130 pages of the transcripts reveal that the Appellant was suffering from a very emotional, stressful situation. The shock and the nature of the family's stress filled the pages of the record.

This State Superintendent disagrees with Respondent's argument that the State Superintendent is not bound by judicial review procedure and Section 2-4-704 MCA, to uphold or reverse the hearing officer's decision on the facts if there is sufficient credible evidence on the record to support the hearings officer. This State Superintendent has adopted the Standards of Review as set forth in the Administrative Rules. The State Superintendent is confined to the record; but if he finds reliable, credible evidence in the record which clearly does not support the County Superintendent's specific findings, and prejudices the rights of Respondent, he is obligated to reverse the same. This is the case. Should I find probative, substantial evidence to support Appellant's claim that she was physically and emotionally unable to teach and she was entitled to her back pay, I am obligated to reverse the County Superintendent's decision.

This State Superintendent was impressed by the testimony of the family physician, Dr. Leonard Klassen. Dr. Klassen has been the Appellant's general family doctor for some 15 years as evidenced by the record. His testimony indicated that he keeps notes on physical examinations but not on all telephone calls prior to April, 1982. He indicated he had frequent opportunities to observe Appellant when he was treating Appellant's husband during the fall of 1981 and the winter of '82 prior to the trip to Bal-

timore. Dr. Klassen observed her appearance and behavior when she would stop at the clinic to pick up prescriptions for her husband. Testimony revealed and Appellant herself testified that she was on the phone to the doctor all the time from November 1981 on. Specific and exact testimony of the doctor revealed that Appellant showed definite signs of stress and depression and was under a great deal of tension. The physician stated:

> I think there were times when she definitely showed a good deal of stress, signs of depression, complained of such things as chronic headaches, sleep disturbances. These to me would all indicate that her ability to do a good job of teaching would be markedly impaired. If it were my child that was her student, I think I would object to her being the teacher.

The following exhange took place during Dr. Klassen's cross examination by Respondent's counsel, James Rector:

Rector:	Did Mary Ann come to you then later in June or July and ask you to write another letter to the school board in regard to this matter?
Dr. Klassen:	I believe so.
Rector:	Did you write a letter of *** July 12th? I hand you what's been marked as Joint Exhibit No. 7.
Dr. Klassen:	Yes, I did write that letter.
Rector:	On the second page of that letter is it not true that the letter states that "Mary Ann Knudsen was under stress from January 22, 1982; she was under severe stress and was emotionally disabled to the degree that she could not perform her teaching duties properly while her husband was away from home and in a life-threatening situation?"
Dr. Klassen:	Yes.
Rector:	What does "emotionally disabled" mean?

Dr. Klassen: Emotionally disabled indicates that the person has difficulty making normal decisions, functioning in a calm, normal manner, being irritable, dealing with the day-to-day problems in a manner that we all would accept as being part of normal mental function.

Rector: Is there anything in your files or do you recollect anything that specifically would point to her showing symptoms of disorientation during this time period or loss of memory?

Dr. Klassen: Well, she would have sleep deprivation which certainly can cause disorientation and abnormal mental functioning.

Rector: Okay. Was there anything that you observed that would point to loss of memory or suicidal, acute emotional responses?

Dr. Klassen: Her physical appearance indicated depression at the time when I saw her.

Rector: Was there any observation that would lead you to believe that she was acting hysterical or she was moody or -

Dr. Klassen: I would say that she was probably moody or depressed. I don't think that she was hysterical.

Rector: Did you personally observe any of these things in her?

Dr. Klassen: Yes.

Rector: When did you do that?

Dr. Klassen: At the times that-at the time of the physical examination in April; also when she came over to pick up medication for her husband.

(Tr. 37, 38)

Dr. Klassen further stated, on cross examination, that depression and anxiety are disabilities (Tr. 33). His final opinion was that it was questionable whether Mrs.

Knudsen could do a good job of teaching under the circumstances during the period at issue. (Tr. 36).

Respondent questions the evidence submitted by Appellant of a mental or emotional disability for the period of time from January 22 to April 27. The letter in question, dated July 12, 1982, was Joint Exhibit #7. Dr. Klassen's letter indicates that she was suffering from severe stress and emotional disability, to the point where she could not perform her teaching functions. Respondent argues that a clinical psychologist testimony indicated he would not have made that particular diagnosis.

Although the hearing officer is the person in a position to judge as to the weight of the evidence on questions of fact, See Pryor Public School District #2 & 3, Pryor, Montana, v. Bruce R. Younguist, OSPI #42-83, this State Superintendent cannot overlook what appears in the record to meet the requirements of the collective bargaining agreement. The evidence clearly indicates that Appellant was operating under a severe degree of stress from January 22 forward. The School Board conceded repeatedly and recognized that Appellant was certainly operating under a degree of stress. Her appearance and the adverse circumstances surrounding this case pointed to that fact. Dr. Klassen had an opportunity to examine Appellant once again on April 27. He was the person best able to judge whether or not the degree of stress was disabling. He indicated that Appellant should be on sick leave and made a determination that the degree of disability had come to the point where she was, in fact, disabled and entitled to benefits. At no time was Appellant, from the record, aware of the fact that she needed additional medical verification.

The Board of Trustees had taken dramatic measures in the way of handling Appellant's extended leave. The Board reserved her tenure status, allowed her health insurance benefits to continue with the district, and held her job open for Appellant so that she might return after her

disability. The Board should be complimented for such action.

Respondent does not argue that stress can be an illness or a disability and conceded to this. What Respondent argued is that disability is a factual determination as to whether or not the stress was at a sufficient degree to cause her to be disabled to a sufficient degree to allow her to be compensated for time taken off during her husband's medical treatment. The record indicates that Respondent delayed in informing Appellant that the particular letters of medical verification were not sufficient for the school district. It was not until a month later that the district informed Appellant that such medical verification was not sufficient. She was working under the assumption that the medical verification she had supplied was sufficient.

The collective bargaining agreement indicates that the school district "may" require a doctor's verification if the absence is more than three days. The affirmative duty is on the part of the school district to inform Appellant if it is not satisfied with the medical verification provided; this was not done in this case.

Respondent presented the testimony of Laurence Stineford, a psychologist who testified on behalf of the school district. He indicated that the patient (described as a hypothetical question) would have been prescribed an anti-anxiety medication. This State Superintendent was unimpressed by the fact that this particular psychologist had not examined Appellant at any time. Dr. Klassen, on the other hand, was the family physican. Dr. Klassen saw Appellant on numerous occasions while he was treating her seriously ill spouse. He would talk to Appellant on the phone and see her pick up prescriptions. Dr. Klassen had greater experience and knowledge on which to make a diagnosis than was provided the psychologist in a hypothetical question. The doctor's testimony was clear; his findings supported the fact that Appellant was suffering a dis-

ability within the terms of the collective bargaining agreement and his testimony indicated the disability was present during the term of this controversy.

This State Superintendent has had an opportunity on several prior occasions to speak to leave requests and decisions of board trustees with regard to personal leave. In Attie Blevins v. Daniels County School District No. 1, OSPI #20-82, a teacher requested personal leave for a specific number of days. The collective bargaining agreement indicated that the leave dates must have prior approval from the district superintendent. Mrs. Blevins disregarded that particular request and went for two additional days. The School Board was required to fill her position with a substitute teacher. In that case the policy was very precise. The teacher was given a definite decision and the definite decision was affirmed by the district superintendent. Despite clear policy and a firm decision of the district superintendent, the teacher chose to violate that policy. There were no emergency reasons given prior to the date of that absence. In Blevins this State Superintendent found there was a clear policy and a clear intentional, willful violation by the teacher. The State Superintendent affirmed the decision of Board to suspend and discipline that particular teacher.

In a second case, Dawn Hanson v. Scobey School District #1, OSPI #21-82, the teacher requested personal leave to visit her daughter in Spain. There were no emergency purposes. The requested leave fell immediately before and after Christmas vacation. The collective agreement indicated that general leave status shall be granted at the sole discretion of the school board of trustees. The school board unanimously approved the district superintendent's decision of disapproving a request for general leave for the teacher. The teacher indicated that regardless of what the school district had intended she would take her leave anyway. The district superintendent wrote the teacher a letter warning her of the consequences of

such decision. The teacher, in direct contravention of the specific and explicit order of the school board and fully aware of the consequences of her actions, took a total of 12 additional unexcused absences. The reason given for absence was a trip to Spain. The superintendent listed specific reasons why the school board of trustees' decision to dismiss Appellant for violating adopted board policies. The teacher left regardless of the fair and full warning of the consequences. The school board fully considered the intentional violations, the consequences of the efficiency and operation of the school districts, and the merits of dismissing this particular teacher. In that case I stated:

> Local school boards must maintain control on the administration of the school district's business. They are elected by popular vote or chosen by reason of their standing in the community, sound judgment, and their interest in the educational development of our young generation. They know and understand the parties and know best the circumstances involved in their school district.

In that particular case a willful, intentional violation of clear board policy was in order. The teacher acknowledged her awareness and chose to violate the board policy. No emergency reasons or special extenuating circumstances as the one presented in this matter were raised.

Appellant Knudsen testified that "her world fell apart" with her husband's illness. They had been together for three decades, during which time she relied on him to make all decisions. She said she was not in a physical and emotional condition to teach. The numerous witnesses who appeared on behalf of Appellant supported the statements of Appellant and provided this reviewing officer an in-depth understanding of the problem.

Appellant was not notified in a timely manner. Had she been told immediately that the board was not satisfied with her letters, she could have provided additional

verification. Appellant asked for sick leave on February 3, 1982. She included a letter from Dr. Klassen. It was not until March of 1982 that the school district asked for additional information. At that time she was located at Johns Hopkins Hospital. Appellant sent two letters on March 16, 1982. It was not until late April that the school district told her the trustees were still not satisfied. Because of the situation and special extenuating circumstance of the illness of her husband, it should have been made very clear to Appellant early on that the medical verification she had supplied was not sufficient.

The County Superintendent's decision denying Appellant paid sick leave during 1981-82 because she was physically and emotionally unable to teach is reversed. The findings are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.

DATED this 4th day of October, 1983.

BEFORE THE STATE OF MONTANA

SUPERINTENDENT OF PUBLIC INSTRUCTION

****

WALLACE LARSON, Appellant, v. THE BOARD OF TRUSTEES OF PONDERA COUNTY SCHOOL DISTRICT NO. 10, Respondent.	)	DECISION AND ORDER OSPI 28-82

****

This is an appeal by a tenured high school teacher, Wallace Larson (Appellant), on his suspension without pay for the period from April 13, 1982 through April 15, 1982 by the Board of Trustees of Pondera County High School District No. 10.

On April 26, 1982 a hearing on this disciplinary proceeding was held before the Pondera County Superintendent of Schools. Her Findings of Fact, Conclusions of Law and Order were issued August 2, 1982. A Notice of Appeal was filed by the Attorney for Appellant on August 17, 1982 and pursuant to Notice from this office, briefs have been submitted by the respective parties and the matter is deemed ready for decision.

This cause is covered by the Montana Administrative Procedures Act and the Standard of Review found in Section 2-4-704 MCA which provides:

> "2-4-704. Standards of Review. (1) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency not shown in the record, proof thereof may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.
>
> 2. The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further

proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(d) affected by other error of law;
(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
(g) because findings of fact, upon issues essential to the decision, were not made although requested."

The issues presented by this appeal revolve around the existence of a school policy which the Appellant may have violated. In that regard, the County Superintendent found as a Conclusion of Law:

> "that Petitioner intentionally violated the policy of the Board of Trustees in not providing chaperones for the District Music Festival in Great Falls on April 2nd and 3rd, 1982."

It is clear from the Findings of Fact of the County Superintendent, as well as in the record as defined that by Section 2-4-614 MCA, that indeed there were no chaperones on the buses as they returned from Great Falls and no chaperones on one bus Friday morning or the two buses Saturday morning. See transcript of hearing. In Conclusion of Law No. 6, the County Superintendent quoted from the policies of the Board of Trustees of the District:

> "continuous disregard for policy and administrative regulations may be interpreted as willful neglect of duty and constitutes grounds for dismissal."

The County Superintendent, however, made no Finding of Fact that Appellant showed continuous disregard for

Board policy in attempting to obtain chaperones. At the same time, the need for chaperones is one that every teacher and/or faculty advisor should recognize as a necessity for minors in out-of-town activities. Indeed, it is so obvious a need for the safety of the students and the district that the Board of Trustees should not have had to specifically articulate the requirement for a chaperone beyond the school board policy and the teacher should have been aware of the need for regular communication and coordination to ensure that this vital requirement was met.

At the same time, in Conclusion of Law No. 9, the County Superintendent found the Petitioner "intentionally or unintentionally violated the policy of the Board of Trustees in not providing bus chaperones." Of course this is admitted by all parties that no chaperones were provided.

This Finding and in most respects, the factual basis found in the transcript are significant in view of three other decisions of my office. See Appeal of Noel D. Furlong v. School District No. 5, OSPI 13-81, Attie Blevins v. Daniels County School District #1, OSPI 20-82 and Dawn Hanson v. Scobey School District #1, OSPI 21-82.

From those appeals, it should be clear that I have tried to support suspension or other punishment where a clear or obvious Board policy is involved. Again, I concur in the finding that as a faculty advisor, Appellant had a clear and unequivocal responsibility for a chaperone to be provided for each bus. It touches upon a basic responsibility of schools to provide reasonable care, supervision and safety to students participating in school programs.

As in Blevins, there was a violation here which was grounds for the Board to impose disciplinary action. I do not find the Board's action or the County Superintendent's decision to be excessive or otherwise unreasonable in light of the facts.

Finally, I strongly agree with the School Board that chaperones should accompany each extracurricular activity. Hopefully there will be close communication and coordination between the faculty advisor and the administration and that in the instance where there are not enough chaperones, special provisions will be made by the administration and the faculty advisor jointly after clear communication and discussion of the problem.

Therefore, the decision of the County Superintendent is affirmed.

DATED February 7, 1983.

BEFORE THE STATE OF MONTANA
SUPERINTENDENT OF PUBLIC INSTRUCTION
****

PRYOR SCHOOL DISTRICT NOS. 2 AND 3, BIG HORN COUNTY, MONTANA Appellant,	)	OSPI 42-83
vs. BRUCE R. YOUNGQUIST, Respondent.	)	DECISION AND ORDER

****

This is an appeal by School District Nos. 2 and 3, Big Horn County, Appellant, from the findings of fact, conclusions of law and order entered on February 18, 1983, by the County Superintendent of Schools, Yellowstone County, Montana.

The Big Horn County Superintendent of Schools was disqualified pursuant to Section 20-3-211, MCA, 1982. The Yellowstone County Superintendent was appointed as hearing officer. Bruce R. Youngquist, Respondent, appeared in person and through his attorney, Doris M. Poppler. The Appellant appeared through their District Superintendent and their attorney, Jock B. West.

Respondent was employed by Appellant School District as an elementary school principal, commencing on August 10, 1981. The following year, Respondent was employed as the elementary and high school principal for Appellant School District.

Respondent was under contract for the school term for a period of ten months. On January 3, 1983, Appellant Board of Trustees dismissed Respondent from the contract as a result of recommendations received from the District Superintendent. The alleged reasons given for the dis-missal include:

1. During the morning of December 14, 1982, you were unable to control your temper, lost your composure and were insubordinate to the Super-intendent during your discussion with the Super-

intendent concerning the handling of the concession stand and gate proceeds of the Lodge Grass basketball game which was played in Laurel during the preceding week. As a result of your inability to control you (sic) temper and maintain your composure as elementary and high school principal, you publically (sic) shouted obscenities at the Superintendent. Said obscenities were done in a public area within the hearing and observation of the high school students which you supervise and set and (sic) example for.

2. That, on December 14, 1982, while in another fit of anger, you used language that is not morally proper nor acceptable for an individual in your position of trust and authority, in the classroom, in the presence of the Senior class. Such language should not be used with impressionable students.
3. That, on December 14, 1982, during a fit of rage and anger, you disregarded the personal safety of a female student by striking said student with your closed fist, in the face, and resultantly bruising and injuring the girl and further, by physically forcing said girl to her knees and holding her there.
4. That during the Fall of 1981, you inflicted bodily harm on a kindergarten student. That, when questioned by the Superintendent you angrily denied that this event happened. In your anger you purposely and deceitfully misled the Superintendent in that you later admitted the incident did happen.

On January 11, 1983, Appellant Board of Trustees conducted a hearing. At the conclusion of the hearing a motion was made to dismiss Respondent for cause based upon

the evidence and testimony which was presented at the hearing. The motion was unanimously passed and Respondent was dismissed pursuant to Section 20-4-207, MCA. Respondent filed a Notice of Appeal pursuant to Secton 20-4-207, MCA, with the County Superintendent of Schools for Big Horn County on January 17, 1983.

Respondent disqualified the Big Horn County Superintendent of Schools pursuant to Section 20-3-211, MCA. The disqualified Big Horn County Superintendent requested that the Yellowstone County Superintendent hear such appeal. The Yellowstone County Superintendent assumed jurisdiction. The hearing was held on January 25, 1983. Following the hearing, the County Superintendent pursuant to Section 20-4-270(2), MCA, found that the dismissal was made without good cause and ordered Appellant Board of Trustees to reinstate Respondent and to compensate him for his contract amount and the time lost during the pendency of this appeal. Appellant Board of Trustees appealed to this State Superintendent.

The facts in this case are exhaustive, as evidenced by a 433-page transcript.

From the record the following facts by way of introduction are revealed. On December 11, 1982, Respondent took a group of teachers and students to a ball game held at the school gymnasium at Laurel, Montana. According to the record, Respondent's duties were checking and accounting for the tickets sold at the gate, the concession stands and their workers, and general supervision for the school. The District Superintendent also attended the game but assumed no responsibility for these matters. On the return trip back to Pryor, Respondent was involved in an automobile accident in Billings which totaled his vehicle. Respondent suffered broken ribs, a broken hand, damage to his teeth, was bruised severely and was sent to the emergency room. Respondent reported such action to the Superintendent and that he would be absent from school on Monday.

The following day, the Superintendent and Respondent met in the Superintendent's office where a confrontation took place over the money deposited in the Security Bank on Friday night. Angry words were exchanged. Such confrontation occurred immediately prior to a teachers' meeting held at 8:05 a.m. to 8:25 a.m.

Later, at the teachers' meeting, Miss Schumacher, senior student advisor, told the principal that she was resigning her position as senior advisor because of a complete lack of responsibility on the part of most of the senior class in helping with the senior fund-raising projects. Respondent called the meeting of the senior class to discuss this problem. One female student remarked to Miss Schumacher, just as she entered the meeting, that she would like to "punch Mr. Youngquist." The meeting was held between Respondent and the seniors to discuss their general attitude.

During the discussion, Miss Schumacher was asked to step in to state her reasons for resigning. One of the boys was rude to her and she left the room in tears. Respondent then scolded the seniors and used the word "losers" in his lecture. A female student jumped to her feet, yelled an obscene term at Respondent as she rushed towards him. There was a confrontation. The student struck the principal in the face, knocking his glasses off and breaking them. Respondent physically grabbed her, and testimony in the record indicates that Respondent struck her face once either with his open or closed hand to restrain her and protect his previous injuries. The entire incident took less than three minutes.

Later, the Superintendent suspended Respondent from the school, called the Board of Trustees and recommended dismissal under contract.

Appellant raises two issues on appeal before this State Superintendent. The issues are found in Appellant's brief presented to the State Superintendent:

1. Whether the record of this case should be supplemented by affidavits as to facts and issues or, in the alternative, if the case should be remanded for further proceedings.
2. Whether the decision of the County Superintendent should be reversed on the grounds that substantial rights of the Appellant have been prejudiced by the County Superintendent's findings of facts and conclusions of law.

This State Superintendent has jurisdiction to decide the present controversy pursuant to Section 20-3-107, MCA.

> "The Superintendent of Public Instruction shall make his decision on the basis of the transcript of the fact-finding hearing, conducted by the county superintendent...and documents presented at the hearing. The Superintendent of Public Instruction may require, if he deems necessary, affidavits, verified statements or sworn testimony as to the facts and issues..."

Appellant argues that the State Superintendent of Public Instruction is required to make the decision based on the above referred to evidence, and is not bound by a decision or determination made by the County Superintendent. This State Superintendent disagrees in part.

Pursuant to Section 20-7-107 and the mandates of the Montana Supreme Court in Yanzick v. School District #23, _____ Mont. _____, 641 P.2d 431 (1982), this State Superintendent adopted the Rules of School Controversy. Within the Rules of School Controversy this State Superintendent formulated the Standards of Review for appeals such as this case. Section 10.6.125 states in its entirety:

> 10.6.125 APPELLATE PROCEDURE - STANDARD OF REVIEW
> (1) The state superintendent of public instruction may use the standard of review as set forth below and shall be confined to the record unless otherwise decided.
> (2) In cases of alleged irregularities in procedure before the county superintendent not shown on

the record, proof thereof may be taken by the state superintendent.

(3) Upon request, the state superintendent shall hear oral arguments and receive written briefs.

(4) The state superintendent may not substitute his judgment for that of the county superintendent as to the weight of the evidence on questions of fact. The state superintendent may affirm the decision of the county superintendent or remand the case for further proceedings or refuse to accept the appeal on the grounds that the state superintendent fails to retain proper jurisdiction on the matter. The state superintendent may reverse or modify the decision if substantial rights of the Appellant have been prejudiced because the findings of fact, conclusions of law and order are:

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) affected by other error of law;

(e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record;

(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion;

(g) because findings of fact upon issues essential to the decision were not made although requested.

This State Superintendent may not substitute his judgment for that of the County Superintendent as to the weight of the evidence on questions of fact. See In the Matter of the Appeal of Kisling v. School District No. 2A(C), Phillips County, OSPI 14-81; Dawn Hanson v. Scobey School District #1, OSPI 21-82; and Yanzick, _____ Mont. _____, 641 P.2d 431 (1982). This State Superintendent may affirm the decision of the County Superintendent or remand the case for further proceedings or refuse to accept the appeal on the grounds that the State Superintendent fails to retain proper jurisdiction on the matter. The State Superintendent may reverse or modify the decision if substantial rights of the Appellant have been prejudiced based on those criteria listed in Section 10.6.125, ARM.

The Montana Supreme Court further noted that Section 2-3-210, MCA, requires the County Superintendent to hear and decide controversies of the Yanzick type and to make the decision based upon the facts established at the hearing. In effect, this requires a hearing de novo before the County Superintendent. The hearing provisions which apply to the County Superintendent are set forth in the Montana Administrative Procedures Act, Section 20-4-612.

> The foregoing statutes contain the procedure to be followed by the county superintendent in the de novo hearing before her. The statutes do not contain a limitation on the decision-making power of the county superintendent. Yanzick pages 196-198.

The Supreme Court also ruled that MAPA provisions of Section 2-4-623, MCA, require that the findings of fact be based exclusively on the evidence and the conclusions of law be supported by authority which is applicable to the State Superintendent as well as the County Superintendent. The State Superintendent as well as the District Court may not substitute its judgment for that of the County Superintendent as to the weight of evidence on questions of fact. Yanzick, p. 200.

The Appellant School District argues that the State Superintendent is under a mandate to accept supplemental affidavits as to facts and issues. Appellant argues that the County Superintendent did not have the benefit of information as contained in Appellant's affidavits. Further Appellant argues that in view of the statements which were made by Respondent on December 14, 1982, the Appellant had no way to foresee the "new version" of testimony and thereby have rebuttal witnesses available.

If the County Superintendent based his decision on facts before him in the record, the State Superintendent must review the record to determine first if the procedure was properly followed and the school district rights protected and not prejudiced and, second, whether the County Superintendent's decision was based on reliable, probative and substantial evidence on the whole record.

A review of the transcript of the hearing reveals that the hearing was conducted in compliance with Section 10.6.116, Administrative Rules of Montana. Each party had a full opportunity to conduct cross examination for the full and free disclosure of the facts, including the right to cross examine the authority of any documents prepared by or on behalf of or for the use of all parties and offered into evidence. All testimony was given under oath. The final order prepared by the County Superintendent included findings of fact and conclusions of law separately stated. Each finding was accompanied by a concise and explicit statement of the underlying facts supporting the finding. These findings were based on the evidence and on officially noted matters. Conclusions were supported by a reasoned opinion as required by Section 10.6.119, ARM. The County Superintendent had the assistance of a legal advisor of the County Attorney of Big Horn County. The parties were represented by legal counsel and the rules of evidence were followed. A proper courtroom atmosphere was maintained throughout the hearing.

The State Superintendent's role in deciding matters of controversy is clearly set out in the Administrative Rules of Montana as well as the Supreme Court decision in Yanzick and the Montana Administrative Procedures Act. The aggrieved party is entitled to appellate review by the State Superintendent who makes his decision based on the record established at the County Superintendent hearing and by reviewing the findings of facts, conclusions and order.

A review of the affidavits submitted to this State Superintendent for consideration reveals that the opposing party did not have an opportunity for cross examination in these matters, nor were they subject to the bright light of cross examination. Witnesses were presented on both sides on all major issues and subjects supplemented by affidavits to this State Superintendent. Many of the affidavits themselves are questionably presented. Several

of the affidavits have writing on them different from the typewriting. Others were cut and pasted together, statements are pasted over prior statements. Affidavits were done in haste with liquid whiteout deleting sections of the affidavits. This State Superintendent will not permit this administrative appeal process to be burdened by nonsupportive affidavits submitted after the de novo hearing. The discretion to submit additional affidavits or additional material is left totally within the discretion of this State Superintendent. See Section 20-3-107, MCA. The State Superintendent, after reviewing the extensive and exhaustive hearing transcript and the documents and exhibits which were introduced at the hearing, finds that it is not necessary to supplement the hearing or the record with additional affidavits and statements where opposing counsel does not have the opportunity to question the same. The Motion to this State Superintendent to accept additional evidence by way of affidavits is denied and Appellant's first issue is dismissed.

The second issue presented for review by the Appellant is that the State Superintendent should reverse the decision of the County Superintendent on the grounds that substantial rights of the Appellant have been prejudiced due to several findings of fact and conclusions of law.

Appellant School Board argues that the State Superintendent should reverse the decision because substantial rights of Appellant have been prejudiced because the findings of fact and conclusion of law and order are "in excess of the statutory authority of the agency," and "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." See Notice of Appeal filed March 21, 1983 to the State Superintendent of Public Instruction.

Appellant argues that the Board of Trustees in exercising its discretion, citing the Yanzick case and Kisling v. School District #2(A), OSPI 14-81, wrestled with the

question as to whether the conduct of Respondent fell within the four enumerated cases of Section 2-4-207, MCA. Appellant argues that it was within its discretion to rule that Respondent's actions established that he was unfit to hold the position of principal.

One specific finding of fact that Appellant School Board of Trustees allege is in error and not supported by the evidence is that the administration of corporal punishment was done without undue anger and in violation of Section 20-4-302 (2), MCA. Appellant claims that testimony presented before the County Superintendent and the Board of Trustees established the actions of Respondent were done in anger.

The incident regarding the female pupil was described in exhaustive testimony by many parties. After examination and cross examination, the two principal parties to the altercations, the pupil and Respondent, gave consistent testimony. Their description of the incident coincided very closely. The other witnesses also testified to the best of their ability, and the County Superintendent as the trier of fact spent fourteen hours listening to this testimony. His findings, again, clearly set out his reasons for his decision.

This State Superintendent will not substitute his judgment for that of the trier of fact. The evidence presented in the record of testimony of over four hundred and thirty pages reveals that the County Superintendent had full opportunity to hear the witnesses and believe or disbelieve the testimony.

Findings of fact number eight and number nine, are supported by substantial evidence in the record. Findings of fact number ten, eleven and twelve indicate correctly the evidence that supports those findings. The State Superintendent finds no error.

Appellant contends that finding of fact number seven was clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. Appellant

disagrees with the finding that the discussion between the Respondent and the District Superintendent was not a private confrontation not heard by anyone giving testimony. Appellant presented a particular witness who testified otherwise.

Appellant selects portions of the transcript and alleges that these portions should be considered by this State Superintendent in reversing the decision of the County Superintendent. Alternatively, Respondent raises areas in the transcript which support the County Superintendent's findings of fact. The issue of the use of obscenities also concerned the Appellant School District. The trier of fact had an opportunity to view the witness, discover the truth, listen to examination and cross examination and determine findings supported by the evidence in the record. The record allows support of the County Superintendent's findings. Those issues are dismissed.

The final issue this State Superintendent reviewed and will address in particular is finding of fact number thirteen. Appellant argues that there is evidence that supports the facts that a spanking of a kindergarten child occurred and that Respondent had lied or misled the County Superintendent. Finding of fact number thirteen states:

> In regard to the spanking of a kindergarten student, the teacher of the student herself testified she had no knowledge of this happening. The meetings arranged between the parent, teacher and principal were never held because the parent did not attend. The only testimony indicating that the incident occurred was testimony of a former secretary of Mr. Youngquist. She indicated that Mr. Youngquist mentioned to her that he had spanked the child and that he would probably hear about it. Youngquist denied using any force on D.W. There was no incident report in any of the school district's records in regard to this incident and there was no evidence produced by the child that was to have received the spanking nor was there testimony that possible corporal punishment if meted out as described by witness Lande was elevated to bodily harm.

Appellant alleges that there is testimony in the

record that proves that a spanking occurred; that it occurred in anger; that it is relevant to the unfitness charge raised by Appellant School District against Respondent. The alleged incident occurred nearly a year earlier. The record reveals there was no infliction of bodily harm on a kindergarten student.

The County Superintendent found that allegation to be untrue. Respondent denied using any force on the kindergarten student. There was no report in any of the school district records in regard to this incident. There was no evidence produced by the child who was to have received the spanking nor was there testimony that possible corporal punishment, if meted out as described by witness Lane, was elevated to bodily harm. The Respondent was rehired for the subsequent year. The only substantive testimony came from a former secretary of Respondent. The County Superintendent chose not to believe this testimony. Further, Appellant argues the mother of the child testified Respondent had spanked the child. On cross examination the mother revealed some boys who were in school told her oldest son, and he came from school to tell her about it. "And I questioned "P" then." (P the kindergarden child.)

"So it was on hearsay from a couple of boys to your son, your older son, then. What did P-did P indicate Mr. Youngquist had spanked him? Answer: Yes.

There was conflicting testimony at the hearing. The County Superintendent chose to believe one version and dismiss this testimony because such was not reliable to the trier of fact.

Appellant voted to dismiss Respondent for cause pursuant to Section 20-4-207, MCA. Appellant indicated that the four incidents set forth in the letter of January 3, 1983 constituted unfitness.

Appellant School District has the ability to maintain control of the district pursuant to its duties to screen teachers as to their fitness to maintain the integrity of

schools. I have supported this right on several prior cases, see Kisling v. School District No. 2A(C), Phillips County, OSPI 14-81; and Dawn Hanson v. Scobey School District #1, OSPI 21-82. The County Superintendent on January 25, 1983 ruled that there was not good cause for the dismissal of Respondent. Appellant now attempts to submit additional affidavits unverified, not subject to the bright light of cross examination, intending that the State Superintendent must receive such information and enter a different ruling. Legally the State Superintendent is bound to uphold the County Superintendent unless for some reason the case was substantially prejudiced because specific finding was not supported by creditable, reliable evidence in the record. This State Superintendent has exhaustively gone over the entire transcript and the exhibits within the confines of the law and finds no error on the part of the County Superintendent that allows a reversal or remand under the Standards of Review controlling this reviewing official. The Appellant rights were not prejudiced by the County Superintendent's decision.

Respondent requested that the State Superintendent, in addition to the order maintained by the County Superintendent, order the payment of attorney fees and costs in defending this action. Such attorney fees request is denied and the County Superintendent's decision is affirmed.

DATED this 28th day of September, 1983.

BEFORE THE STATE OF MONTANA
SUPERINTENDENT OF PUBLIC INSTRUCTION
****

EMILY A. GEHRING, Appellant, -vs- SCHOOL DISTRICT #27, LIBERTY COUNTY, MONTANA Respondent.	)	OSPI 23-82 DECISION AND ORDER

****

This is an appeal by Emily A. Gehring, hereinafter referred to as Appellant. Appellant is a nontenured teacher. Appellant's teaching contract was not renewed for the 1982-83 school year by the Liberty County School District #27 Board of Trustees, hereinafter referred to as the Board. The Board gave Appellant timely notice pursuant to Section 20-4-206 MCA that they would not renew her teaching contract. Appellant requested reasons for her nonrenewal, and the Board stated the reasons in writing.

Appellant disputed the nonrenewal and requested a hearing before the Liberty County Superintendent of Schools. The County Superintendent of Schools requested that written briefs be submitted by the parties to clarify whether the County Superintendent could assume jurisdiction in the matter and hold a hearing. Briefs were submitted.

On June 24, 1982, an Order was issued by the County Superintendent denying the hearing because "Petitioner has not alleged any violation of any law, duty or rule applying to the trustees. Therefore, it is the opinion of the undersigned (County Superintendent) that no legal controversy has been established for which a hearing can be held."

The County Superintendent denied a hearing to the nontenured teacher's nonrenewal of her contract. It is from that Order that Appellant appeals her case to this State Superintendent.

The sole issue on appeal as provided in the Notice of Appeal of Appellant, is:

> Whether the decision of the County Superintendent to not grant Appellant a hearing is contrary to Section 20-3-210, MCA, and denies Appellant due process guaranteed her by both the United States and Montana Constitution, and is based on error of fact and law.

Appellant presents both a statutory and a constitutional claim for a due process hearing right before a County Superintendent. However, in Appellant's reply brief (page 6 and 7), responding to a constitutional argument presented by Respondents, Appellant states:

> The argument of the Appellant is that her dismissal gives rise to controversy under Title 20 in the procedure of her termination and thus she has a right to a hearing under Section 20-3-210 MCA. No one has ever mentioned the words just cause or due process.
>
> Respondent School Board cites Board of Regents v. Roth, 408 US 564 (1972). Appellant is not arguing a due process right under the Constitution. Rather, she is arguing a statutory right. Thus, there is no need to get into the Roth argument.

Appellant has further limited the issue on review in this appeal from the original issue presented in the Notice of Appeal to the State Superintendent. The issue for purposes of this appeal is whether there is a statutory right for a nontenured teacher whose contract has not been renewed by a board of trustees for a due process hearing before the county superintendent of schools.

The following statutes are relevant for examination:

> Section 20-4-206. Notification of nontenure teacher reelection --acceptance -- termination and statement of reason. (1) The trustees shall provide written notice by April 15 to all nontenure teachers who have been reelected. Any nontenure teacher who does not receive notice of reelection or termination shall be automatically reelected for the ensuing school fiscal year.
>
> (2) Any nontenure teacher who receives notification of his reelection for the ensuing school

fiscal year shall provide the trustees with his written acceptance of the conditions of such re-election within 20 days after the receipt of the notice of reelection. Failure to so notify the trustees within 20 days may be considered nonacceptance of the tendered position.

(3) When the trustees notify a nontenure teacher of termination, the teacher may within 10 days after receipt of such notice make written request of the trustees for a statement in writing of the reasons for termination of employment. Within 10 days after receipt of the request, the trustees shall furnish such statement to the teacher.

(4) The provisions of this section shall not apply to cases in which a nontenure teacher is terminated when the financial condition of the school district requires a reduction in the number of teachers employed and the reason for the termination is to reduce the number of teachers employed.

Section 20-3-210. Controversy appeals and hearings. (1) Except as provided under 20-3-211, the county superintendent shall hear and decide all matters of controversy arising in his county as a result of decisions of the trustess of a district in the county. When appeals are made under 20-4-204 relating to the termination of services of a tenure teacher under 20-4-207 relating to the dismissal of a teacher under contract the county superintendent may appoint a qualified attorney at law to act as a legal adviser who shall assist the superintendent in preparing findings of fact and conclusions of law. Subsequently, either the teacher or trustees may appeal to the superintendent of public instruction under the provisions of appeal of controversies in this title. Furthermore, he shall hear and decide all controversies arising under:

(a) section 20-5-304 or 20-5-311 relating to approval of tuition applications; or

(b) any other provision of this title for which a procedure for resolving controversies is not expressly prescribed. (emphasis supplied)

In comparison, for purposes of this Decision and Order, on renewal of a tenure teacher, the relevant statutes are as follows:

20-4-204. Termination of tenure teacher services. (1) Whenever the trustees of any district resolve to terminate the services of a tenure teacher under the provision of 20-4-203(1), they shall, before April 1, notify such teacher of such termination in writing by certified or registered letter or by personal notification for which a signed receipt is returned. Such

notification shall include a printed copy of this section for the teacher's information.

(2) Any tenure teacher who receives notice of termination may request, in writing 10 days after the receipt of such notice, a written statement declaring clearly and explicitly the specific reasons for the termination of his services, and the trustees shall supply such statement within 10 days after the request.

(3) Within 10 days after the tenure teacher receives the statement of reasons for termination, he may request in writing a hearing before the trustees to reconsider their termination action. When a hearing is requested, the trustees shall conduct such a hearing and reconsider their termination action within 10 days after the receipt of the request for a hearing. If the trustees affirm their decision to terminate the teacher's employment, the tenure teacher may appeal their decision to the county superintendent who may appoint a qualified attorney at law as legal adviser who shall assist the superintendent in preparing findings of fact and conclusions of law.

(4) Subsequently, either the teacher or the trustees may appeal to the superintendent of public instruction under the provision for the appeal of controversies in this title.

Appellant's argument is that the nonrenewal of the teaching contract is a termination of employment. Since this is a dispute or "controversy" between a teacher and a school district, such controversy must be resolved pending a hearing before the county superintendent of schools pursuant to 20-3-210 MCA. Appellant further argues that the termination of a contract is an employment right and therefore taking that employment right away, regardless of whether a tenure or a nontenure teacher is involved, must allow a nontenured teacher a right to the administrative remedies as provided in school controversy statutes of Montana school law.

An examination of a teacher's contract is in order. Before employment can be terminated, employment must exist. Employment of a public school teacher, such as Appellant herein, must be accomplished by contract.

Section 20-4-201. Employment of teachers and specialists by contract. (1) The trustees of any district shall have the authority to employ any person

as a teacher or specialist, but only a person who holds a valid Montana teacher or specialist certificate or for whom an emergency authorization of employment has been issued that qualifies such person to perform the duties prescribed by the trustees for the position of employment. Each teacher or specialist shall be employed under written contract and each contract of employment shall be authorized by a proper resolution of the trustees and shall be executed in duplicate by the chairman of the trustees and the clerk of the district in the name of the district and by the teacher or specialist.

(2) No contract of employment with a teacher or specialist shall require such teacher or specialist to teach more than 5 days a week or on any holiday recognized by 20-1-305. No deduction shall be made from a teacher's or specialist's salary by reason of the fact that a holiday falls on a school day. Any teacher's or specialist's contract made in conflict with the 5-days-per-week provision of this section shall not be enforceable against the teacher or specialist.

(3) Whenever the trustees of a county high school and the trustees of the elementary district where the county high school is located form a joint board of trustees under the provisions of 20-3-361, such joint board of trustees may execute a contract of employment with a teacher or specialist who shall serve both districts. When such a contract is executed, the two districts shall prorate the compensation provided by such contract on the basis of the total number of instructional hours expended by such teacher or specialist within each district.

(4) Any contract executed under the provisions of this section may contain the oath or affirmation prescribed in 20-4-104, and the teacher or specialist shall subscribe to such oath or affirmation before an officer authorized by law to administer oaths.

The Board's relationship to a nontenured teacher is by written contract. The written contract specifies the terms and conditions of both parties. Section 20-4-201 provides several limitations on what may be required of a teacher in the contract. A contract exists for the term specified within the contract. Once a term has expired, the contract for that specific year also ends. A teaching contract, therefore, serves several purposes, including satisfaction of the requirements of 20-4-201 MCA.

The Board has no obligation to renew Applicant's teaching contract. Appellant had not received tenure.

Section 20-4-203, MCA provides that a teacher does not obtain tenure until he or she accepts a teachers contract for the fourth consecutive year. Once tenure has been achieved, then the relationship between these contracting parties takes on a new dimension. This State Superintendent has repeatedly ruled that a tenure teacher is entitled to more protections by statute than was afforded in the contract as to a nontenured teacher. Tenured rights cannot be lessened by allowing the nontenured teacher status to elevate to that of a tenure teacher. See Jones v. Ravalli County School District No. 15-6, OSPI #19-82, In the Matter of the Appeal of Kisling, OSPI #14-81, In the Matter of Appeal of Clyde Knudson, State ex rel. Saxtorph v. District Court 128 Mont. 352, 275 P2d 209 (1954).

A nontenured teacher has an additional statutory right. The right is one of renewal. Section 20-4-206 provides that trustees shall provide written notice by April 15 to all nontenured teachers who have been re-elected. Any nontenured teacher who does not receive notice of reelection or termination shall be automatically reelected for the ensuing school fiscal year.

The nontenured teacher, therefore, has no obligation to renew a written contract between the teacher and the board. The board has a statutory obligation to choose reelection or nonrenewal. If they fail to do either, then the teacher by statute is automatically reelected for the ensuing school year.

When a board chooses not to renew the contract of a teacher, they cannot secure the services of that teacher. The statute requires employment by written contract. Failure to issue a new written contract and notice of such action terminates the services of a teacher for that particular school district. The teacher is not entitled to a termination of employment status at nonrenewal. Termination of a nontenured teachers employment status is accomplished by 20-4-207 MCA. The renewal of a written

contract provides reemployment of a nontenured teacher. Nonrenewal provides no reemployment. The dismissal of any teacher pursuant to 20-4-207 MCA under contract provides an abrupt end or termination of services within the term or period of the contract of the teacher between the teacher and the school district. That action constitutes termination of employment, with appropriate due process recourse.

The Montana Supreme Court in Wibaux Education Association v. Wibaux County High School, ____ Mont. ____, 573 P2d 1162 (1978) recognized that the continuation of a nontenured teacher's employment from year to year involved the annual renewal of the contractual relationship. Further, the nontenured teacher may not be placed in the position of tenure until the offer and acceptance of the fourth consecutive contract.

Appellant claimed that she was not arguing that there is no difference between a tenured and a nontenured teacher. Appellant claims the difference goes to deciding the merits of the case and not to the jurisdiction of the county superintendent to hear the controversy. Appellant argues that controversies include nontenured teacher nonrenewals. This Superintendent disagrees.

If, for example, a board decides to dismiss a teacher under contract for no reason whatsoever during the term of that contract, the nontenured teacher has a contract right and may pursue contract and statutory remedies including an appeal to the county superintendent. Upon completion of the contract term, there exists no legal relationship between the school district and the nontenured teacher. No contractual relationship exists. No employment relationship exists. The only things that exist are the familiarity of the teacher, his or her past performance and the board of trustees' decision not to renew and issue a new teachers contract to this particular teacher. Renewal of a nontenured teacher is automatic only if notification of nonrenewal is not issued by the board to the teacher. That

is the extent of the renewal protection by statute. For very practical reasons, the legislature has provided that process. A teacher must know whether his or her contract will be renewed so he or she may seek employment elsewhere.

Prior State Superintendents have held that nontenured teachers do not have a statutory right to a hearing before the county superintendent of schools on the nonrenewal of a nontenured teachers contract. In the matter of Thomas Connolly v. School District #1 Board of Trustees, issued April 12, 1979, the then State Superintendent responding to Appellant's argument that a nontenured teacher has a right to a hearing, said in part:

> To accept Appellant's premise would be to require the county superintendent to hold a full blown evidentiary hearing on the request of any terminated nontenured teacher. Viewing the statutes relating to school controversies as they hold, I conclude the legislature did not intend such a result. The statutes relating to the termination of a tenured teacher (20-4-204) and those relating to the dismissal of a teacher during the term of his contract (20-4-206) and those relating to the dismissal of a teacher during the term of his contract (20-4-207) clearly and explicitly provide for a right to a hearing. The statute pertaining to the termination of non-tenured teachers (20-4-206) does not contain any such provision. Dunphy v. Anaconda Co. 151 Mont. 76, 438 P2d 660 (1968). The express mention of a certain power implies the exclusion of nondescribed powers. State ex rel Jones v. Giles, 168 Mont. 130, 541 P2d 355 (1975). In view of these well established principles of statutory construction I conclude that the issues raised by Appellant here do not create "controversy" within the meaning of Section 20-3-210 MCA.

Appellants argue that a recent District Court decision in Jones v. Board of Trustees, #DV 81-243, Missoula County, District Court ruled that a nontenured teacher had to exhaust his administrative remedies provided under Section 20-3-210 MCA before he could file an action in district court. In Jones, the Court dismissed the case of a nontenured teacher because the teacher had failed to exhaust his administrative remedies under Section 20-3-210

MCA. In support of that decision, the District Court cited School District #12, Phillips County v. Hughes, 170 Mont. 267, 552 P2d 328 (1976). The Court's remand of school disputes through the administrative appeals procedure is correct. In Jones, however, the Court held that a non-tenured teacher who alleged that a school board had not followed the procedural requirements of Section 20-4-206 MCA could not pursue his case in district court until he applied for a hearing before the county superintendent of schools. The court based its decision on School District #12, Phillips County v. Hughes, 170 Mont. 267, 552 P2d 328 (1976). Hughes case dealt with a teacher who was dismissed during the contract term and not a nonrenewal of a contract. The Hughes case deals with a property right under contract.

Section 20-3-210 MCA provides:

> Controversy appeals and hearings. (1) Furthermore, he shall hear and decide all controversies arising under:
>
> (a) section 20-5-304 or 20-5-311 relating to the approval of tuition application; or
>
> (b) any other provision of this title for which a procedure for resolving controversies is not expressly prescribed.

Also in Jones, the Court did not order the County Superintendent to conduct a hearing. The Court concluded:

> Based on the above facts, this court concludes that as a matter of law, plaintiff is not entitled to have his cause heard in this court until he has exhausted the remedies set forth by the legislature for proceedings of this nature.

The Court denied Plaintiff's motion for summary judgment in that case. The determining issue was whether or not the court should hear that matter at that time.

The Court instructed the Plaintiff to exhaust his administrative remedies. The court did not order a county superintendent to conduct a hearing but allowed the teacher to make an appeal to the county superintendent. The

county superintendent then had to determine whether he or she may accept jurisdiction on the matter. If the County Superintendent allows the appeal but rejects jurisdiction, then the teacher may appeal the decision to the State Superintendent of Public Instruction, as was done in this case. If the State Superintendent of Public Instruction upholds the decision of the County Superintendent not to hold a hearing, then for purposes of appeal to the district court, Appellant had exhausted his or her administrative remedies. What action the Court may take in affirming, reversing and/or remanding the State Superintendent's decision back to the county superintendent would be in order at that time.

This State Superintendent has examined the differences between Section 20-4-204 and 20-4-206 MCA in conjunction with Section 20-3-210 MCA and has concluded that nonrenewal of a nontenured teacher's contract is not a controversy within the meaning of Section 20-3-210 MCA.

Since the appeal taken in this case, this State Superintendent has adopted the Uniform Rules of School Controversy for the County Superintendent and the State Superintendent of Public Instruction. See Section 10.6.101 Administrative Rules of Montana. These rules were adopted pursuant to Section 20-3-107 MCA and provide further clarification on the procedure for the County Superintendent.

Section 10.6.102 states:

> School controversy means contested case (1) Contested case means any proceeding in which a determination of legal rights, duties or privileges of a party is required by law.

Section 10.6.104 states:

> Jurisdiction (1) The county superintendent shall upon receipt of the Notice of Appeal, determine: (a) whether the appeal is a contested case; (b) whether he/she has jurisdiction on the matter. (2) The county superintendent may determine that he/she does not have jurisdiction or the power to act and therefore

> render such determination and return such notice and order to the appealing party. The county superintendent, upon determination of proper jurisdiction and proper contested case, shall hear the appeal and take testimony in order to determine the facts related to the contested case.

In this instance, Appellant must secure the express agency ruling before seeking judicial relief.

Appellant argues that she does not seek reinstatement of this particular teacher. She argues that she is entitled to a hearing. A hearing would not change Appellant's employment status. Any hearing at all would amount to an idle act which is not required by Montana law. Section 1-3-223 MCA.

Appellant is not claiming a constitutionally protected procedural due process right. She is not arguing contract right but simply a statutory right. The issues of guaranteed tenure or property interest as expressed in the Board of Regents v. Roth, 408 US 564 (1972), and Akhtar v. Van deWetering, ____Mont. ____ 642 P2d 149 (1982) address those issues. Since Appellant has no vested statutory right to employment or a statutory right to a hearing, and does not argue constitutional or contractual rights, Appellant is not entitled to any further procedural consideration. The Montana Supreme Court in Chovanak v. Mathews, 120 Mont. 520, 188 P2d 582 (1948) discussed the term "controversy" within that judicial context. The case involved an action brought by a citizen to have the legislation authorizing slot machines declared unconstitutional. The district court dismissed the action. The Supreme Court affirmed and discussed what constitutes a "controversy." Citing the United States Supreme Court, the Court found that "controversy" is "one that is appropriate for judicial determination." Chovanak at 526. The court found no legal right that the Board of Equalization had denied the Appellant. The court went on to note the "Appellant's complaint is in truth against the law, not against the Board of Equalization."

This is very similar to the case on appeal. Appellant was not renewed. The fact that the Appellant does not agree with the Board's action does not create a controversy. In this case, as in Chovanak, Appellant's complaint is against the status of the law, not the board of trustee's application of that law.

A right to a hearing before the county superintendent is only allowed when a "controversy" exists. A nontenured teacher disputing a nonrenewal does not have a statutory right to a hearing before the county superintendent of schools. The County Superintendent's order is affirmed.

DATED this 21st day of March, 1983.

BEFORE THE STATE OF MONTANA
SUPERINTENDENT OF PUBLIC INSTRUCTION
****

PAMELA PAUN, Appellant, -vs- BOARD OF TRUSTEES, CHOUTEAU COUNTY SCHOOL DISTRICT #56, CHOUTEAU COUNTY, MONTANA Respondent.	OSPI 31-82
and, LEONARD MURPHY, Appellant, -vs- BOARD OF TRUSTEES, HAYS LODGE POLE PUBLIC SCHOOLS, BLAINE CO. #50, Respondent.	DECISION AND ORDER OSPI 27-82

****

Upon stipulation and motion of counsel in both cases cited above and by order of this State Superintendent, these cases have been consolidated within this Decision and Order. The Decision and Order related to the sole question on appeal: Whether "to find (or hire or get) a better teacher" is a reason sufficient to meet the non-renewal notice required by Section 20-4-206 (3) MCA.

All teachers in the above entitled cause were non-tenured teachers. Their boards of trustees decided not to renew their teachers' contracts pursuant to Section 20-4-206 MCA. The teachers in these cases allege that the reason given, "that we can find a better teacher" is not sufficient to meet the statutory requirements of Montana law.

In both cases, the County Superintendent refused to conduct a hearing to decide the merits of the case. The decision to deny the appeal was similar in both cases.

Appellants also argued that nontenured teachers have a right to appeal before the County Superintendent of

Schools. This State Superintendent recently ruled in Gehring vs. School District #27, Liberty County, Montana, OSPI #23-82, dated March 21, 1983, that a nontenured teacher has no statutory right of appeal of a board of trustees' decision not to renew the contract for nontenured teacher under 20-4-206 MCA. See also Thomas Connolly vs. School District #1 Board of Trustees, Decision and Order issued April 12, 1979. Further, this State Superintendent has concluded that since there is no statutory right of appeal for nonrenewal of a nontenured teacher's contract, no controversy exists within the meaning of Section 20-3-210 MCA or under the definition of the Uniform Rules of School Controversy for the County Superintendent and the State Superintendent of Public Instruction. See section 10.6.102 Administrative Rules of Montana.

Appellants argue that nontenured teachers are not seeking a property or liberty interest. Appellant claims a specific statutory right to the reasons for termination of employment and that no reason has been supplied. Appellants argue that this State Superintendent should, as a matter of law, rule that the fact that the trustees feel they can "hire a better teacher" is not a reason for Appellants' termination as required by Section 20-4-206(3) MCA. In the alternative, they believe that this State Superintendent should remand the matter to the county superintendent with instructions to hold a hearing, if the parties cannot agree on a stipulation of facts, and to consider legal arguments prior to rendering a decision.

The issue of whether or not a controversy exists, and ultimately whether or not Appellant is entitled to a hearing before the county superintendent, can be clarified and resolved by the simple determination of the legal sufficiency of the reason given by the board of trustees for Appellant's renewal. A legal determination, not a factual determination, is required here.

In Robert Jones v. Ravalli County School District #15-6, OSPI 19-82, I extensively reviewed in a fourteen-page

opinion the status of nontenured teachers in Montana. I will extensively refer to Jones in this case. I discussed the importance of the board of trustees being able to govern school districts. The Montana Supreme Court in Yanzick v. School District #23, ___ Mont. ___, 641 P.2d 431, 39 St.Rptr. 191 (1982) recognized the vital and important role of the board of trustees which is vested with both statutory and constitutional rights to supervise, manage and control its school, including the hiring and firing of teachers.

> A wide discretion is necessarily reposed in the trustees who compose the board. They are elected by popular vote, and, presumably, are chosen for reason of their long standing in the community, sound judgment, and their interest in the educational development of the young generation which is so soon to take the place of the old. See Yanzick.

The Court went on to state:

> A teacher works in a sensitive area in a classroom There he shapes the attitude of young minds towards a society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and duty to screen officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. Yanzick pp. 201, 202, 203.

As I stated in the Jones decision;

> The legislature has indicated its desire to place local control of schools in the local school districts, especially control of teachers. The courts have continually recognized that control and affirmed their decisions. School District #12, Phillips County v. Hughes, 170 Mont. 267, 272-273, 552 P.2d 328, 331 (1976). School District #4 v. Kohlberg, 169 Mont. 368 (1969), Yanzick.

In Jones I cited B.M. a minor by Leona M. Burger, her guardian Ad litem v. State of Montana, et al., __ Mont. ___ P2d ___ 39 St.Rptr. 1285 (1982). The case placed an additional concern, tort liability, on boards of trustees in their capacity to administer schools. The importance of the decision of B.M. again is wide ranging, in that the

court discussed public policy and the duties and responsibilities of school authorities and school boards to ensure that students in the state receive appropriate education. The Court placed direct responsibility on boards of trustees to maintain an educational standard of care.

As I stated in Jones:

> The boards of trustees sit in a fiduciary capacity. They hold the helm of each school district, establishing and developing not only a competent system but more importantly the best educational system that public money can provide. They oversee the budgets and the public financing of schools on the local level and they maintain the ultimate decision on hiring and firing of teachers. They are directly accountable to the parents and students of a school system if sound education is not provided. They are also responsible to ensure that the educational school system does not meddle in mediocrity and just getting along, but does strive to achieve and seek excellent standards in teaching and preparing our youngsters as future adults of this state. The ultimate result of this duty and responsibility is to ensure that our youngsters are receiving the best education public money can buy and at the same time afford those well competent and accepted teachers in the school system privileges of tenure. See Jones pp. 7.

In Jones I traced the development of nontenured teacher protection. I cited Cookson v. Lewistown School District #22, 351 F.Supp. 983 (D. Mont. 1972). In that case a nontenured teacher argued that there was no determination of whether the reason provided by a school district was sufficient and legally proper under the Standards of Review of the Montana Administrative Procedures Act. In upholding the nonrenewal of a nontenured teacher justified by the school board on the basis that only average teaching could be expected from the teacher, the Court said:

> It is quite clear that Montana has adopted an employment policy...which frees a school board from any tenure problems during the first three years of a

> teacher's employment. These three years are the testing years during which not only may the teacher's merits be weighed, but the school's needs for a particular teacher assessed... (I)n the interests of creating a superior teaching staff a school board should be free during a testing period to let a teacher's contract expire without a hearing, without any cause personal to the teacher, and for no reason other than that the board rightly or wrongly believes that ultimately it may be able to hire a better teacher. Cookson, pp. 984-986.

At the time of Cookson, the Federal Court determined that the laws of Montana permitted a school district to terminate the services of a nontenured teacher without reason. In Jones I discussed the development of the law:

> By 1975, (Mont. Laws Ch. 142) the Legislature amended what was then RCM 1947 Section 75-6505.1 (now Section 20-4-206(3) MCA) and required that the school district, if requested to do so, give the reasons for a failure to renew a nontenured teacher's contract.
>
> Section 20-4-206(3), MCA provides:
>
> > When the trustees notify a nontenured teacher of termination, the teacher may, within 10 days after receipt of such notice, make written request to the trustees for a statement in writing of the reasons for termination of employment. Within 10 days after receipt of the request, the trustees shall furnish such statement to the teacher.
>
> The legislature did not say that a nontenured teacher was provided with a new, substantive property interest or any right now enjoyed by a tenured teacher. The discretionary powers of the board of trustees and the local control were not altered.
>
> This position was affirmed In the Matter of the Appeal of Evelyn J. Keosaian. Decision and Order rendered June 4, 1976 by Superintendent Dolores Colburg...
>
> ...although my predecessor found that the reason does not comport with the intent of the statute, she did affirm the decision of the board to terminate and upheld the validity of the termination. She went on to say:
>
> The foregoing does not change the fact that Ms. Keosaian's employment with the district will ter-

minate at the end of her present contract since a statement of reasons is not a prerequisite to a valid termination.

The appeal was returned to the County Superintendent with instruction to order the Board of Trustees of School District No. 44, Flathead County, to give Ms. Keosaian a statement in writing of the reason or reasons for the termination of her services. One other significant statement made by Superintendent Colburg was that she accepted as true the Board's belief that it could find a better teacher. This case was not appealed, and Ms. Keosaian was not renewed.

A board's ability to not renew was reaffirmed five years later by Branch v. School Dist. No. 7, 432 F.Supp. 608 (D Montana 1977). There, another board said that it refused to reappoint a nontenured teacher because it "could hire a better teacher to complement the system." The teacher claimed that retaliation for her criticism was the real reason for the non-reappointment. In upholding the board the court noted that "(t)he problem posed here is not whether there was good cause for not renewing the plaintiff's contract but whether it was not renewed for some impermissible cause." Branch P. 610. In the court's opinion, the plaintiff was "an able and effective teacher," but the court refused to substitute its judgment for the school board's. It was the board's prerogative, the court said, to select the type of teachers it wanted to put in the classroom as long as the decision was not taken to stop an activity protected by the First Amendment or for any other constitutionally impermissible reason and that the Board believed the reason to be true.

The court further illustrated in Branch that even though an interpretation was not requested, the tenure laws provided more protection for the teacher requiring "explicit and clear reasons be given in writing." See Branch P.610, footnote 5. It is well to repeat that in the cases of Yanzick and Branch, competent teachers were terminated. Both the Montana Supreme Court and the Federal District Court were not impressed nor did they find relevant the fact of satisfactory competency or good standing in terms of a teacher's ability. It was the board's prerogative, the courts said, to select the type of teachers it wanted to put in the classroom as long as the decision was not taken to stop an activity protected by the First Amendment or for any other constitutionally impermissible reason. In the case before us, we find that the Board provided a reason which was not constitutionally impermissible. It believed it to be true and its discretion has not been altered. (See transcript and record.)

Other Federal District Courts have affirmed a board's right not to reappoint a nontenured teacher in order to strengthen the staff or to obtain a better teacher. See Powers v. Mancos School District, RE-6, 391 F.Supp. 322 (D. Colo. 1975), aff'd, 539 F.2d 28, (10th Cir. 1976), Phillippe v. Clinton-Prairied School Corp., 394 F.Supp. 316 (S.D. Ind. 1975), Mayberry v. Dees, 663 F.2d 502 (4th Cir. 1981).

Not everyone satisfies the prerequisite qualifications necessary to be granted tenure in a particular school district. Tenure is a privilege extended by local school boards which are vested with the power from the community and responsible for education.

Although a board may refuse to keep a competent teacher in order to seek a better one, it may not use the explanation to cover up a nonrenewal for a constitutionally impermissible reason. See Branch, Cookson, Keosaian, Roth v. Board of Regents, 408 U.S. 564 (1972). A board may not refuse to renew a contract when the real reason for nonrenewal is the teacher's race, sex, national origin, or religion or desire to rid itself of a teacher who has criticized the school's administration. Such protections from the First Amendment and other rights from the constitution clearly cannot be the grounds or the basis for nonrenewal of a nontenured teacher. Appellant has not claimed any constitutionally impermissible reason as found in Roth and Keosaian and the record reveals no such evidence.

Non-tenured teachers do not have a vested property interest in the position. The nontenured teacher is employed on a one-year basis, and his/her relationship is defined by a one-year contract. See Section 20-4-201. There are no entitlements to automatic renewal. To allow more will substantially weaken the tenured rights of those deserving teachers who are tenured with the district. This Superintendent has recognized the importance of those tenure rights and cannot allow such an indirect challenge on tenure to weaken the integrity of tenure laws. See Kisling v. School Board, OSPI #14-81, Decision and Order, Knudson v. School Board, OSPI 6-81, Decision and Order, Sorlie v. School District, OSPI #10-81, Decision and Order, affirmed 13th Judicial District Court, September 18, 1982. Whether a nontenured teacher has interests requiring more procedural due process in a dismissal under contract is not presented to this Superintendent and will not be addressed.

This State Superintendent has followed the Montana Administrative Procedures Act in all school controversy appeals made to him pursuant to Section 20-3-107 MCA, and has adopted those Standards of Review in the Uniform Rules of School Controversy see Section 10.6.125, A.R.M.

In striving for excellence in Montana schools, trustees must retain the ability to ensure that the educational school system does not meddle in mediocrity, but strives to achieve standards of excellence in teaching and preparing our youngsters as future adults of this state. Tenure laws are established to protect the excellent teachers we have and to grant a unique employment privilege to those teachers.

In the case before us, we find that the board provided a reason which was not constitutionally impermissible. The board belived it to be true, and its discretion has not been altered. In this case, as in Jones, Appellants have not claimed any constitutionally impermissible reason for their nonrenewal. Therefore, since the reason given for Appellants' nonrenewal is sufficient as a matter of law, there can be no controversy merely because Appellants disagree with the law.

Any hearing would amount to an idle act which is not required by Montana law. See Section 1-3-223 MCA. Until Appellants are granted tenure, their property interest, and their right to accept continued employment, is not vested. Board of Regents v. Roth, 408 US 564 (1972), Akhtar v. Van de Wetering, _____ Mont._____, 642 P.2d 149 (1982). This State Superintendent finds support for the sufficiency of the reason in prior Federal decisions, prior administrative cases and legislative committee minutes and Section 20-4-206(3). Since there are no disputes as to the facts in this case, no evidenciary hearing is required.

An issue of law was presented to this Superintendent and I have found that the reason "to find a better teacher" is legally sufficient under Section 20-4-206 MCA. The

county superintendents did everything in a proper manner. They received the appeal; determined whether they had jurisdiction; found only a legal issue; consulted their legal advisors; and being advised that the law in the area was clear, they rendered their decision.

School boards have the legal responsibility, as well as a moral obligation to their communities, to put the best available teacher in the classroom despite objections from teachers and the unpleasantness that this task often produces. This task further must not create costly legal actions where no further rights exist and which divert precious, limited school monies to these actions.

The County Superintendent's decision is affirmed.

DATED this 23rd day of May, 1983.

BEFORE THE STATE OF MONTANA
SUPERINTENDENT OF PUBLIC INSTRUCTION
****

JOSEPH X. SHUTAK Appellant, vs. TRUSTEES OF PONDERA COUNTY SCHOOL DISTRICT #1, HEART BUTTE, Respondent.	OSPI 44-83 DECISION AND ORDER

****

This matter arises from an appeal of a County Superintendent's Decision dated April 11, 1983 which determined that the nonrenewal of a nontenured teacher is not a controversy within the meaning of 20-3-210 MCA or under the definition of controversy found in Section 10.6.102 ARM.

This matter was briefed by the Appellant and submitted following an Order dated August 25, 1983.

In the Appellant's brief, reference is made to Paun v. Board of Trustees, Chouteau County School District #56, Chouteau County, Montana, OSPI 31-82 and Leonard Murphy v. Board of Trustees, Hays-Lodge Pole Public Schools, Blaine County #50, OSPI 27-82. Those matters were decided by this State Superintendent on May 23, 1983.

The attorney for the Appellant was mailed a copy of those decisions and is thus clearly aware of the position this State Superintendent has taken with regard to the main issue presented in this appeal.

For the benefit of the teacher this State Superintendent encloses and attaches to this decision those prior decisions. This State Superintendent also will be quoting from that combined order.

As a matter of law, this State Superintendent has held that the reason advanced by the board of trustees in this instance is not constitutionally impermissible. Since

it was sufficient as a matter of law, there can be no controversy merely because the Appellant disagrees with the law. This State Superintendent has cited numerous state cases as well as federal cases dealing with the issue of nonrenewal of nontenured teachers in Montana. The issue has been exhaustively reviewed by the courts, and the reason "to find a better teacher" is legally sufficient under Section 20-4-206 MCA. As in the other cases Paun and Murphy, supra, the County Superintendent here did everything in a proper manner. The appeal was received, a determination was made as to whether or not there was jurisdiction and a decision was rendered.

School boards have the legal responsibility as well as a moral obligation to their communities to put the best available teacher in the classroom despite objections from teachers and the unpleasantness that this task often produces. Since all legal duties and rights have been met there is no need for further extensive and expensive legal proceedings. School monies and resources are limited and should be primarily directed toward education.

The decision of the County Superintendent is hereby affirmed and those reasons advanced by this State Superintendent's May 23, 1983 decisions in causes OSPI 31-82 and OSPI 27-82, a copy of which are attached hereto and are incorporated by this reference, are provided herein.

DATED this 27th day of October, 1983.

BEFORE THE STATE OF MONTANA
SUPERINTENDENT OF PUBLIC INSTRUCTION
****

TIM J. MASSEY, Appellant, v. CUSTER COUNTY DISTRICT HIGH SCHOOL and MILES CITY SCHOOL DISTRICT NO. 1, Respondent.	)	DECISION AND ORDER OSPI 33-82

****

This is an appeal by Tim J. Massey, hereinafter referred to as Appellant, from the findings of fact, conclusions of law and order of the Custer County Superintendent of Schools dated September 14, 1982, affirming the decision of the Board of Trustees of Custer County District High School and Miles City School District No. 1, hereinafter referred to as Respondents, decision not to renew Mr. Massey's contract for 1982-83 school year.

Appellant is a tenured teacher with the Respondent school system where he was endorsed in business education and health and physical education. He was employed with the Respondent beginning in 1975 as a high school teacher where he taught in the business education department. Appellant has never been employed in the physical education department of the Respondent district. Due to a drop in enrollment, the board of trustees of the Respondent district found it necessary to reduce staff in the business education area. All business education teachers in the district, including Appellant, had acquired tenure as business education teachers.

Appellant was timely notified that his teaching contract would not be renewed for the 1982-83 school year. He requested reasons on April 5, 1982; these reasons were supplied on April 12, 1982.

While Appellant was terminated, several teachers in the physical education area were nontenured and remained employed in the school district.

The issue revolves about the retention of the non-tenured physical education teachers and the termination of Appellant who, while certified as a physical education teacher, never had any actual teaching experience in that area. Specifically for the purposes of this appeal, I consider the issue to be:

> Whether it was error for Respondent to terminate Appellant in the business education area while retaining nontenured teachers in the physical education and health area. In other words, does a Montana teacher acquire the protection and benefits of tenure for all subjects in which he was certified even though tenure was acquired only in one subject area for which he or she taught?

This cause is covered by the Montana Administrative Procedures Act and the Standards of Review found in Sections 2-4-704 MCA which provide:

> Standard of review. (1) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency not shown in the record, proof thereof may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.
> (2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decision are:
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
> (g) because findings of fact, upon issues essential to the decision, were not made al-

though requested.

This case presents a fundamental issue of the interpretation of Montana's tenured teacher law as articulated by the legislature and the courts.

This Superintendent has recognized the long established definition of tenure articulated by the courts in the case of State ex rel. Saxtorph v. District Court 128 Mont. 352, 275 P2d 209 (1954). In that case tenure was defined as follows:

> A teachers' tenure is a substantial, valuable and beneficial right which cannot be taken away except for good cause.

This Superintendent has also decided recently several cases dealing with tenure, reduction in force and the comparable position issue. The recent cases of Holter v. Valley County School District No. 1,OSPI 7-81, Holter v. Valley County School District, OSPI 29-82, and Sorlie, OSPI 10-81, have discussed various aspects of tenure, comparable position and the management rights of public employers.

Section 20-4-203 MCA provides:

> "Whenever a teacher has been elected by the offer and acceptance of a contract for the fourth consecutive year or employment by a district in a position requiring teacher certification except as a district superintendent or specialist, the teacher shall be deemed to be re-elected from year to year thereafter as a tenure teacher at the same salary and in the same or comparable position of employment as that provided by the last executed contract with such teacher, ... (emphasis supplied)

This right of course has been limited by the management rights of public employers found in Section 39-31-303 MCA which provides:

> ...public employees and their representative shall recognize the prerogatives of public employers to operate and manage their affairs in such areas as, but not limited to:

> 1. direct employees;
> 2. hire, promote, transfer, assign and retain employees;
> 3. relieve employees from duties because of lack of work or funds, or under conditions where continuation of such work be inefficient and nonproductive;.. (emphasis supplied)

The issue of whether or not a reduction in force (RIF) was needed has not been raised by Appellant in this appeal. The only contention is that someone other than Appellant should have been relieved of his or her duties. In addition, the criteria adopted by Respondent district has not been challenged by the Appellant insofar as it focused on the business education area. Appellant contends that he should have been given priority over a nontenured teacher in the physical education area even though Appellant had no actual experience.

A brief discussion and progression of the Reduction in Force cases to date is in order. In Holter I, I recognized and directed that tenured teachers cannot be terminated in an area where they have experience and certification and be replaced by nontenured teachers. In Holter I, unlike this case, the school district had not focused on a subject area nor had it analyzed all teachers in that area with teaching experience.

In Sorlie, I held that once a teacher acquires tenure, tenure goes with the teacher as he or she is transferred to other responsibilities or positions. In other words, the comparable position protection of Section 20-4-203 goes with the teacher who is tenured if he or she is transferred to a new position. Again this was not the case in this appeal. Here, Respondent properly determined an area where a reduction in teachers was necessary. The Respondent analyzed the tenure status of all teachers involved in the subject area of business education and reduced its force in that area by terminating the teacher with least tenure.

I believe this is adequate protection of tenure for comparable position and consistent with the Montana sta-

tutes and case law. I further hold that for the purposes of interpreting the comparable position requirement of Section 20-4-203 MCA teaching experience is necessary. See Sorlie, OSPI 10-81, to the extent that this overrules the decision by a previous State Superintendent, Reynolds v. Gallatin County School District #4, rendered by my predecessor at the end of her term. That decision is expressly overruled. I believe that the good cause discussion is clarified by reference to the management rights of public employers and that a drop in enrollment is good cause for termination provided that tenured teachers are given the special consideration which they deserve under the law. Since it appears that the legal requirements of tenure have been met by Respondent in this case, the decision of the Custer County Superintendent of Schools is affirmed.

DATED February 25, 1983.

BEFORE THE STATE OF MONTANA
SUPERINTENDENT OF PUBLIC INSTRUCTION
****

SCHOOL DISTRICT #9, LEWIS AND CLARK COUNTY, MONTANA, Appellant, -vs- MR. AND MRS. WILLIAM WIEDBUSCH, Respondent.	OSPI 38-83 DECISION AND ORDER

****

This is the second appeal growing out of a controversy in Lewis and Clark County involving the Respondent Parents and the Appellant Resident School District. The controversy revolves about the minor child of the Respondent Parents (T.W.). My first decision and order in this matter was issued September 3, 1982. See Mr. & Mrs. William Weidbusch v. School District #9, Lewis & Clark County, OSPI 25-82. The Lewis and Clark County Superintendent dismissed the matter without a hearing. I found that order to be contrary to State and Federal special education law and reversed his decision. I directed that an evidentiary hearing be held on the following issues:

1. Whether the parents were afforded due process including notice of their rights, their right to request a hearing within the residential school district if they objected to the placement of the child, being informed of those rights, either actually or by written sign off. Procedural due process in special education laws includes noticing requirements of the school district to the parent and other rights outlined in the special education laws. See OCR complaint finding Juniata, Pennsylvania County School District, Feb. 18, 1983, 257:337 CRR Law Reporter.

2. Whether the parents had exhausted all of their avenues of relief within the district and other considerations, before the decision to unilaterally remove the child.

3. Whether the parents of the child followed the appropriate and explicit directions of federal and

state administrative rules in securing the due process rights for their child.

4. Whether a proper request for a child study team evaluation was made prior to the extraordinary step of unilateral placement.

5. Whether a due process hearing was requested and denied before the parents independently and unilaterally withdrew their child from the residential school district.

6. Whether the parents were involved in the educational determination process of their child in the residential school, were they informed of their rights prior to the individual education plan meetings and whether they participated in and understood the child study team meetings. Appellants must show that they did not fail to pursue legal procedure as guaranteed to them in the Administrative Rules of Montana or under federal law prior to their action of independent withdrawal and placement of their son in another school district.

Following that order, Missoula County Superintendent of Schools Mike Bowman assumed jurisdiction in the case and held hearings October 26, 27 and November 5, 1982. Lewis and Clark County Superintendent was disqualified to proceed on this case. County Superintendent Bowman issued his final Findings of Fact, Conclusions of Law and Order on December 22, 1982, with an Amendment dated January 18, 1983. Both the Appellant School District and Respondent Parents have appealed that decision.

Each side's appeal contends that the other is completely responsible for tuition costs of T.W. The parties have exhaustively and voluminously briefed the issues presented by the first decision in an effort to succeed with their arguments concerning the financial responsibility of the opposing party. I will follow the analysis set forth in my earlier opinion, see Mr. & Mrs. William Weidbusch v. School District #9, Lewis & Clark County, OSPI 25-82, as well as the standard of review which I have adopted in 10.6.125 ARM and which is also found in Section 2-4-704 MCA. I will not reweigh the evidence weighted by the County Superintendent unless such evidence was arbitrary and capricious, or constitutes an abuse of discretion based upon the record.

Following review of the record of over 570 pages, I must concur with the findings of fact arrived at by County Superintendent Bowman. They are as follows:

I.

T.W. is the son of the Petitioners, and at all pertinent times was an elementary school age child living with Petitioners within Respondent School District No. 9, Lewis and Clark County, Montana.

II.

T.W. attended the first grade during the 1973-74 school year.

III.

T.W. was retained in the first grade and successfully completed it in the 1974-75 school year.

IV.

During the 1975-76 school year, T.W.'s second grade year, T.W. was referred to the special education program, to which the Petitioners consented in writing. An evaluation was done by Mr. Benish and Mr. Van Valkenburg, and based on the results of the evaluation and with the approval of the CST (child study team), T.W. was not enrolled in the special education program. T.W. was enrolled in a remedial reading program for the remainder of the second grade, and Petitioners agreed to this placement.

V.

T.W. was placed in a class with a low student-to-teacher ratio for the third grade of the 1976-77 school year. Petitioners consented to this placement.

VI.

On March 1, 1977, T.W. was referred to Lois Moore for a CST evaluation, which was conducted on March 16, 1977. An Individual Education Plan was adopted by the CST, and it was carried out with the consent of the Petitioners. The check-off list used by Lois Moore to document what procedures and processes had occurred with respect to T.W. is not conclusive, standing by itself, as to whether or not Petitioners were denied due process, because Lois Moore was not present to testify on the matter.

VII.

As called for in the March CST meeting, a follow-up CST evaluation was held in May, 1977, and an Individual Education Plan was prepared for T.W.'s fourth grade in the 1977-78 school year. Petitioners were present and consented to the plan.

VIII.

T.W. was enrolled in a regular classroom, not a resource room, for the fourth grade during the 1977-78 school year.

IX.

On January 16, 1978, Dr. Moore, the family pediatrician of Petitioners, wrote to Robert Runkel, a school psychologist at the Special Education Co-operative, requesting a follow-up examination of T.W. There is no evidence of any follow-up on the part of Mr. Runkel to that request.

X.

In T.W.'s fifth grade during the 1978-79 school year, Petitioners, T.W.'s teachers and principals held a meeting, and T.W. was enrolled in a Title I reading program.

XI.

T.W. was enrolled in a Title I reading class in the sixth grade for the 1979-80 school year.

XII.

In T.W.'s seventh grade in the 1980-81 school year, his teacher, Judy Maynard, recommended that T.W. be placed in a remedial reading program which was refused by Petitioners. Petitioners asked that T.W. be given his assignments one week in advance and this request was refused by Glenda Buckley, who taught the special reading class. T.W. was then placed in a special spelling program, to which Petitioners consented, and in which T.W. participated until his removal from school.

XIII.

On January 5, 1981, Petitioners removed T.W. from the school and enrolled him in District #1, the Helena Junior High School, without the recommendation of District #9, the resident district.

XIV.

On January 29, 1981, Petitioners wrote a letter to Ethel Scheet, Chairman of the Board of Trustees of District #9, informing her of their reasons for withdrawal, coupled with a demand that the district pay T.W.'s tuition. This request was denied by the Board at the next regularly scheduled meeting.

XV.

Petitioners instituted a complaint and sent it to Dal Curry of the Office of Public Instruction, alleging failure to provide a free and appropriate education for T.W. Mr. Curry submitted a Report of Preliminary Finding in response to the complaint.

XVI.

On November 10, 1981, Mr. Weidbusch orally requested the East Helena School District #9 to convene a CST. The request was denied by the Board of Trustees.

XVII.

On November 16, 1981, Mr. James Reynolds, attorney for the Petitioners, contacted Ethel Scheet and requested a hearing before the Board on the question of payment of tuition. The request was denied by Ethel Scheet on December 9, 1981.

XVIII.

Petitioners appealed the Board's decision, which denied the request for a hearing, to the County Superintendent of Schools, Richard W. Trerise, on December 28, 1981. The County Superintendent issued a decision on June 14, 1982, dismissing the appeal and denying a hearing. Petitioners appealed that decision to the Office of Public Instruction, which reversed the Superintendent's decision and remanded the case back on September 3, 1982. He issued an Assumption of Jurisdiction and appointed Mike Bowman, Missoula County Superintendent of Schools on September 29, 1982 to continue the case. A pre-hearing conference was held on October 25, 1982, and a hearing commenced on October 26, 1982, continued on October 27, was recessed until November 5, 1982, and concluded on that date.

Under my established standard of review and as set forth in Yanzick v. School District No. 23, _____ Mont. ____, 641 P.2d 431 (1982), I will next address the con-

clusions of law arrived at by County Superintendent Bowman. I will not reverse those conclusions or modify them unless there is a mistake of law, a violation of constitutional or statutory provisions, or other error of law such as not being supported by findings, or for any of the other reasons set forth in Section 2-4-704 M.C.A. Those conclusions of law were as follows:

I.

> Petitioners were actively involved in the educational determination process of T.W. in the respondent school district and have not proved the denial of their due process rights prior to January 5, 1981, at which time they unilaterally withdrew T.W. from respondent school district.

II.

> The evidence presented is inconclusive as to whether or not an appropriate public education was provided for T.W. prior to January 5, 1981.

III.

> Petitioners were denied their due process rights by their resident school district on November 10, 1981, at which time the board denied petitioner's request that a child study team be convened to evaluate T.W.

Conclusion I deals with the primary concern which I ordered these additional hearings to consider. From his findings, the conclusion reached by the County Superintendent was that the due process rights were afforded to the parents in this case, and I find no basis on which to reverse that conclusion. To be sure, there is a dispute in the evidence and the facts claimed by the parties. That is most often the case in a contested hearing, but the hearing officer here, County Superintendent Bowman, viewed both the documentary and the testimonial evidence first hand and reached his conclusion.

Conclusion II in part, flows from the findings and Conclusion I and is worthy of discussion. On its face it is a bit vague and addresses the issue of an appropriate

"public education." As I stated in my first order, the concept of due process and fairness seems also to be integral in the determination of an appropriate public education. The findings entered by the County Superintendent and conclusion indicates that the school district met the obligation of fairness and due process with regard to the minor child here. Both sides discussed Board of Education v. Rowley, ____ U.S. ____ 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). A review of the record does indicate that the minor child did experience continued and significant difficulty during his schooling at School District #9. By the same token, the record reveals constant and significant efforts on the part of the school district to address those issues. Again, it appears to be a factual dispute which is most properly evaluated by the hearing officer. I find no error of law or other abuse in the County Superintendent's determination in Conclusion II and hereby clarify Conclusion II, to provide that the school district did provide the minor child with a free and appropriate education prior to January 5, 1981.

Finally, we come to conclusion III which does find a denial of "due process rights" on December 10, 1981 because the school district failed to hold a hearing or convene a child study team. The thrust of the conclusion is to impose financial responsibility on the school district for the period subsequent to November 10, 1981. County Superintendent Bowman's findings indicate a unilateral removal of the child prior to exhaustion of all avenues of relief within the district (see my issues 2 through 5, pages 6 and 7, September 3, 1981 decision). The County Superintendent did not make a finding of bad faith on the part of the school district nor did he find that the child's well-being was jeopardized by continued enrollment in the school. Further, the record indicates that the parents had no intention of returning the child to the East Helena School District for education at the time they made the request for the child study meeting. Indeed the child study team had already been convened in Helena at

the time of the unilateral withdrawal of the student, and the parents expressed their complete satisfaction with the program proceeding in Helena. The only reason apparently was a request for retroactive reimbursement.

Both parties in their briefs have discussed the grounds for the application of the doctrice of retroactive reimbursement. As in many other areas of the law, that issue has evolved and I believe the parties have accurately addressed the fundamental issues concerned.

First, did the school district act in bad faith with regard to the education needs of the minor child prior to his unilateral removal on January 5, 1981? The answer from the County Superintendent's reading of the evidence presented clearly was no.

Second, was the well-being of the child threatened in the school district at the time of the unilateral withdrawal on January 5, 1981. County Superintendent Bowman did not make a finding on this issue, but the record does not reveal any threat to the well-being of the child that precipitated the action of the parents - only the frustration of the parents with the system.

Further, the County Superintendent indicated in his Amended Findings, Conclusions and Order that it was his opinion that each school district must continue to provide a free and approriate education for children even when parents unilaterally withdraw the student from school and do not reenroll or seek to readmit the child. I disagree.

The record indicates that the parents had unilaterally withdrawn their child from the Respondent School District. The County Superintendent was correct in his statements that a residential school district must provide a free and appropriate public education to all students. I would agree that such responsibility also extends to students who have been removed from the residential district and whose intent is to return and readmit their child in the residential school district. The intent must be expressed so that it is clear that the residential

district will anticipate the return of the child after the withdrawal and that such return is a commitment upon the parents to attend such school. Unilateral removal with no intention of returning or placing the child back into the residential school district, places no responsibility on the residential district to convene a child study team. In this instance, it is especially noteworthy that a child study team was already functioning in the Helena school system for this child. With the existence of such child study team it would unnecessarily complicate the task to establish and convene yet another child study team by the East Helena School District. The law does not require an idle act.

I agree with the school district's contention that the enrollment of the child in the school district is one necessity for a child study team to be convened. If a student at a private school in the resident district were presented for a child study team evaluation and program, the school district would have had an obligation under our rules to provide that service. However, in this instance, the parents found that Helena school system provided adequate services and needs for their particular child. It appears from the record that there was no intent to return the child to the residential school district. I believe a resident school district would have the obligation to convene the child study team if the child were a resident of the district and <u>did not</u> already have a child study team functioning for him.

That is not the case here. Again, the child was unilaterally removed without evidence of bad faith or threat to well-being. The parents testified that they would not have returned the child to the school, and there is nothing in their request to the school to indicate that the child would be enrolled in the East Helena District. It would seem that to convene a second child study team with possible complications and obvious duplications is not the intent of either state or federal regulation in

this area. While the situation did not evolve in this case, it would be possible to have two different recommendations and avenues of appeal from each of those determinations by each of the two school districts further complicating rather than resolving the educational needs of this child. Indeed it appears from the record that the request for a CST was only to absolve the parents of financial responsibility and not to seek the actual input of a CST.

I therefore hold that in this case where there was a unilateral withdrawal of a child without a finding of bad faith or threat to well-being with a subsequent request to the resident district for a CST after a CST was already functioning in the child's out-of-district placement and where the parents did not indicate that the child would be enrolled in the resident district--there is no obligation to convene a child study team. No obligation for retroactive reimbursement arises nor does an obligation to provide tuition from that point forward arise.

As the record demonstrates in this case, significant disputes as to actual allegations are present. As I addressed in my first opinion where such complex issues are presented, it is imperative for a full hearing to occur. The parents as well as the district must have their day in court. A complete record was established for review.

The parties conducted this matter in the hearing with professionalism, and I compliment them and County Superintendent Bowman for their handling of this case.

Based on the foregoing opinion the decision of the County Superintendent acting for the County Superintendent of Schools of Lewis and Clark County is affirmed in part and modified and reversed in part in accordance with this decision.

Dated this 9th day of September, 1983.

BEFORE THE STATE OF MONTANA
SUPERINTENDENT OF PUBLIC INSTRUCTION
****

SCHOOL DISTRICT NO. 84, FERGUS COUNTY, MONTANA, Appellant	
-vs-	OSPI 30-82
THOMAS BRINEY, Respondent.	DECISION AND ORDER

****

This is an appeal from School District No. 84, Fergus County, Montana, Appellant herein, appealing the decision of Fergus County Superintendent of Schools dated August 19, 1982. The County Superintendent reversed an earlier decision of the Board of Trustees of School District #84 and ordered that Thomas Briney, Respondent, be rehired by the school district or, in the alternative, receive "appropriate remuneration for the loss of his contract." Both parties are represented by counsel in this matter. Appellants have submitted written briefs. Respondent has not submitted written briefs on this matter. Oral argument was conducted by this Hearing Officer.

The State Superintendent of Public Instruction, pursuant to the Uniform Rules of Controversy, has disqualified himself from this case and has appointed this Hearing Officer to serve in his capacity. Both parties have stipulated on the acceptance of this Hearing Officer.

From the record, the following facts are found. Respondent has been employed by the Appellant School District #84, Fergus County, Montana for 14 years, as a half-time guidance counselor. He is a tenured teacher with that school district. Respondent is endorsed as a guidance counselor and is also endorsed to teach commercial and business subjects.

For several years Denton School District #84 and Geraldine School District have agreed to employ Respondent by dividing his time between schools. The Appellant School

District has experienced a declining enrollment, from 193 for the 1975-76 school year to 128 for the 1981-82 school year for grades 1 through 12. Throughout the entire hearing, the record reveals that Appellant school district was in financial trouble. The reliance on the local mill levy was approaching well over one-third of the total general fund budget of the district. From 1975 through 1982 the total certified personnel of Appellant School District has declined from 17½ positions to 14½ positions. The Appellant School District, shown through extensive testimony, made a concerted effort to reduce its costs in response to declining enrollment and still keep its programs within levels acceptable to taxpayers of the community.

The Board of Trustees was expressly concerned about the continued acceptance of high mill levies by the voters.

A collective bargaining agreement between the Appellant School District and the Denton Teacher Association provided in part:

> In a situation where the board feels it necessary to relieve teachers from duties because of lack of duties or funds, or a change of curriculum or under conditions where continuation for such work would be inefficient or nonproductive, the Board may use but is not limited to the following criteria: personnel evaluations, recommendations of the administration, years of service, and the needs and requirements of the district, as determined by the board. If all of the preceding criteria were generally equal, tenured teachers would have preference over nontenured teachers.

On January 6, 1982, Appellant applied to the Board of Public Education for permission to substitute an alternative "teacher guide" plan for guidance counselor standards 406 and 407 of the Standards for Accreditation of Montana Schools in accordance with standard 108, a provision for allowing use of alternative standards. This would have had the effect of eliminating the guidance counselor position and spreading the duties among the teaching and administrative staff.

On February 1, 1982 the Board of Public Education approved the application.

On February 9, 1982, Superintendent Sorenson of Appellant School District informed Respondent of the anticipated abolishment of the guidance counselor position and the reduction in force. On February 17, 1982 the Board of Trustees received the recommendation for abolishment of the guidance counselor position from Superintendent Sorenson but did not act upon it. Also, at that time, the Board of Trustees approved tenure for nontenured teacher James Graham.

On March 8, 1982, the Board of Trustees voted not to renew Respondent's contract and to eliminate the guidance counselor position.

On March 10, 1982 Respondent was notified of the elimination of his position and the termination of his tenured services. On March 22, 1982 Appellant by letter to the Office of Public Instruction withdrew its application for use of the alternative guidance plan.

The County Superintendent also found that teacher James Graham taught business, commercial, and physical education courses, for which he is certified and properly endorsed. The County Superintendent also found that there was no substantial evidence presented to indicate that either Respondent or Graham are not qualified in the areas in which they are certified and therefore it is found that both are qualified in said areas.

The County Superintendent concluded that the Appellant School District failed to prove that the position occupied by nontenured teacher Graham was not available for Respondent although it showed some possibilities of inconvenience to the district. For purposes of this appeal the County Superintendent held that Graham was a nontenured teacher. For purpose of this review, this Hearing Officer finds that the status of "nontenure" or "tenure" has no effect on the final outcome in this case.

The budget of the Denton School District for school year 1982-83 for both the high school and the elementary school apportions a minimum amount of funds for each budget item, leaving no funds for a reserve and no reasonable reapportionment possible. The item budgeted for teacher salaries does not include a salary for a guidance counselor.

The Board of Trustees notified Respondent in writing on March 10, 1982 that his contract would not be renewed for the school year 1982-83. He requested reasons for the nonrenewal on March 14, 1982. Reasons were delivered to him in writing on March 17, 1982. On March 25, 1982, he requested a reconsideration hearing before the Board of Trustees.

On April 15, 1982, Respondent signed a contract with the Geraldine School District to continue his half-time guidance counselor position at Geraldine, knowing at that time that he would not be issued a contract by Appellant School District.

The Appellant Board of Trustees held a hearing on April 27, 1982, pursuant to stipulation of the parties. The Board made, seconded and passed a motion to affirm its earlier action not to renew Respondent's contract for 1982-83. On May 7, 1982, Respondent appealed the Board's decision to the County Superintendent of Schools.

This Hearing Officer pursuant to the Uniform Rules of School Controversy Section 10.6.125 ARM has used the Standard of Review as set out in that section. In part, that section states:

> (4) The state superintendent may not substitute his judgment for that of the county superintendent as to the weight of the evidence on questions of fact. The state superintendent may affirm the decision of the county superintendent or remand the case for further proceedings or refuse to accept the appeal on the grounds that the state superintendent fails to retain proper jurisdiction on the matter. The state superintendent may reverse or modify the decision if substantial rights of the Appellant have been prejudiced because the findings of fact, conclusions of law and order are:

(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(d) affected by other error of law;
(e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record;
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion;
(g) because findings of fact upon issues essential to the decision were not made although requested.

Among other errors of law, Appellant claims that there is no teaching position held by a nontenured teacher at the Appellant School District which Respondent is endorsed to fill and that no nontenured teacher will be assigned to serve as guidance counselor at Appellant School District. Appellant School District voted on February 17, 1982 to renew the teaching contract of James Graham to teach commercial, business and physical education classes. Although Respondent is certified to teach commercial and business classes, he is not certified to teach physical education. (Respondent was not endorsed to perform the duties of the position occupied by a nontenured teacher in the system.)

Appellant presents several issues before this Hearing Officer.

1. Whether the elimination of Respondent's position conformed to the requirements of Montana law.

2. Whether Appellant complied with all legal requirements of the reduction in force.

3. Whether the law requires Appellant to hire Respondent to fill a teaching position which includes subjects that Respondent is not endorsed to teach.

Appellant School District was required to reduce its staff. The Board of Trustees chose to eliminate a position. The position was that of guidance counselor. The School District applied the following criteria: recommendations of the administration and the needs and re-

quirements of the school district pursuant to the requirements of the collective bargaining agreement.

Contrary to the County Superintendent's conclusions, and from a reading of the record there is no teaching position held by a nontenured teacher at Appellant School District for which Respondent is endorsed to serve and no nontenured teacher will be assigned to serve as guidance counselor at the Denton School District. Respondent argued that a nontenured teacher, James Graham, was left on staff and should have been removed in the reduction in force. The testimony of the Superintendent of Appellant School District indicated that there was no way to reschedule the teaching assignment of the teaching staff to allow Respondent to teach business and commercial courses and still accomplish a reduction in force, since the district then would have been required to hire another teacher to teach physical education. Further, the district would have found more complications in scheduling to allow Respondent to teach part-time every day in Appellant School District and part-time at Geraldine School. From the testimony in the record, the School District at Geraldine was not willing to make the necessary rescheduling for travel and different class scheduling to allow dual employment.

State Superintendent Ed Argenbright has stated on several occasions that school districts must maintain the right to transfer, assign and eliminate positions pursuant to their management rights in Section 39-31-303 MCA. See James C. Holter v. Valley County School District No. 13, OSPI 7-81, James C. Holter v. Valley School District #13, OSPI 29-82, Tim J. Massey v. Custer County District High School & Miles City School District #1, OSPI 33-82, and In the Matter of Irene Sorlie, OSPI 10-81.

From a complete overview of the record Appellant School District complied with each step required by law:

1. Appellant decided that a reduction in staff was necessary. The financial condition of the school district through the hearing testimony provided substantial evidence that the school district was in financial trouble.

2. The school district determined that a reduction in staff was necessary; and that an entire position would need to be eliminated. The position the Board of Trustees decided to eliminate was that of guidance counselor.

3. Pursuant to former decisions of the State Superintendent, the school district looked to the program to decide which individual would be eliminated. There was no group of guidance counselors to pick from because the school district had only one counselor on staff.

4. The Board of Trustees decided to eliminate the position of counseling staff, which is within their discretion, and to accept the deviation from accreditation standards. The Appellant Board of Trustees determined that the administration and the experienced tenured personnel on staff would handle all counseling problems. Counseling would no longer be a separate program. Further, the Board was relying on the plan approved by the Board of Public Education. No teacher was reassigned to assume Respondent's guidance counseling duties.

Appellant District made no assurances at any time that the board would offer Respondent a teaching contract for the 1982-83 school year.

Tenure is a substantial, valuable and beneficial right which cannot be taken away except for good cause. See the Matter of the Appeal of James C. Holter v. Valley School District. #13, OSPI 29-82, and State ex rel Saxtrorph v. District Court, Fergus County, 128 Mont. 253, 275 P.2d 209 (1954). After a conclusion is made that a teacher's position must be reduced, a school district cannot terminate a tenured teacher and retain a nontenured teacher to fill a position for which the tenured teacher is qualified. See Massey.

> It must be affirmatively shown that the teacher to be riffed was selected from a pool or group and that those who are to take over the RIF tenured teacher's duties are not nontenure and that in all other respects the RIF policy has been followed. The "possibility" that such may occur is not sufficient. See Holter I.

Respondent argues that since he is endorsed to teach commercial and business subjects, the school district violated its RIF policy by not renewing his contract while renewing the contract of the nontenured teacher to teach commercial and business subjects and physical education. The law does not require a school district to create a position for any person.

> It is essential to the concept of tenure that this same or comparable position of employment as that provided by the last executed contract be analyzed in the record and in the findings, conclusions and order which deal with the reduction in force of a tenured teacher. This specifically refers to the grade or school in which the teacher last taught and does not mean any teaching position in which the teacher may be certified. See James C. Holter v. Valley Coun-ty School District No. 13, OSPI 7-81 and James C. Holter v. Valley School District #13 OSPI 29-82.

The County Superintendent concluded that since there is another position available and held by a nontenured teacher, that Respondent should be given this position. This conclusion is incorrect.

Appellant Board had to decide whether to deviate from the accreditation standards by not providing a guidance counselor position or to deviate from the accreditation standards by allowing a certified teacher to teach in certain areas where he was not endorsed to teach, e.g., physical education. The school district determined that it would have less impact on the school curriculum not to provide a guidance counselor but to provide a certified teacher endorsed in the area of physical education. Further, the Board provided a plan to reassign counseling duties to teachers and administrators. Once that decision was made, Appellant had no choice but to renew the nontenured teacher's contract for 1982-83, contrary to the County Superintendent's conclusion. Appellant School District proved conclusively that not only was there no guidance counselor position available, but further established that there was no other teaching position avail-

able for which Respondent was fully endorsed to teach. Appellant fulfilled its responsibility.

The record makes it clear that the nontenured teacher was also involved in extracurricular activities throughout the school district. Such activities included coaching a variety of sports, which is important for that school district.

A nontenured teacher may be hired or retained, even though a tenured teacher is dismissed, as a result, if the tenured teacher is not qualified to teach the courses to be taught by the nontenured teacher. See 100 ALR 2d 1186. See also Holter II, OSPI 29-82.

Further, the collective bargaining agreement between the Denton Education Association and the Appellant School District does not force the retention of tenured teachers who cannot teach the necessary subjects. It requires preference of tenured teachers over nontenured teachers only if all of the criteria stated in Article X, Section 4 of the collective bargaining agreement are "generally equal." These criteria are: personnel evaluations, recommendations of the administration, years of service, and the needs and requirements of the district, as determined by the board. The Board did not breach the collective bargaining agreement by retaining the nontenured teacher.

Respondent was a tenured teacher, and if certified in the areas of physical education, with experience in that school district in physical education, then the County Superintendent's decision would have been affirmed

The County Superintendents' decision is reversed.

DATED this 6th day of May, 1983.

BEFORE THE STATE OF MONTANA
SUPERINTENDENT OF PUBLIC INSTRUCTION
****

BISSELL-OLNEY SCHOOL DISTRICT #58 Appellant, v. FLATHEAD COUNTY TRANSPORTATION COMMITTEE, Respondent.	DECISION AND ORDER OSPI 35-82

****

Bissell-Olney School District #58 filed a Notice of Appeal to the Superintendent of Public Instruction from a decision of the Flathead County Transportation Committee by Wallace D. Vinnedge, Chairperson, dated November 10, 1982. Pursuant to Notice the parties have submitted briefs and requested oral argument; I denied that request based upon the relatively clear decision that the case presents.

Since this is an appeal from a decision of the County Transportation Committee, I will apply the standard found in the Montana Administrative Procedures Act Section 2-4-704 MCA which provides:

> Standards of Review. (1) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency not shown in the record, proof thereof may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.
>
> (2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(d) affected by other error of law;
(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
(g) because findings of fact, upon issues essential to the decision, were not made although requested.

The findings of fact do not appear to be disputed by either of the parties, and they provide the basis for the controversy.

Appellant School District #58, Bissell-Olney, is an established elementary school district in Flathead County formed since 1907 and is a part of School District #44, an established school district in Flathead County which maintains grades one through twelve. A majority of high school students within the Bissell-Olney district attend Whitefish High School. Because Whitefish provides transportation to its high school students, the opportunity is presented for elementary students also to attend Whitefish elementary schools even though they reside within the Bissell-Olney district. In the case presented, 15 Olney elementary students and 2 Bissell elementary students ride the District #44 buses to school in Whitefish rather than attending their more closely located District #58 school. Further, District #44 does not charge a fee to transport these elementary students. From this the District #58 trustees argue that:

1. The practice of Whitefish, District #44, picking up elementary students is unfair and should be stopped.

2. District #44 is creating special bus stops for elementary students in order to "raid" students from District #58.

3. Whitefish is not charging students; that is also unfair, and a uniform policy charging out-of-district students should be adopted.

The conclusions of law adopted by the County Transportation Committee found that the high school routes were properly within the transportation service area and were in accordance with Section 20-10-132 MCA. While the District #58 trustees argue that the law gives the Transportation Committee the power to adjust school bus routing, it does not make such an adjustment mandatory. The County Transportation Committee has the discretion to adjust the school bus routing but it is not required to do so upon application from one or more dissatisfied school districts. Generally it has been my policy not to substitute my decision in a purely local, discretionary matter. Local boards of trustees and local county transportation committees have a much better perspective of the overall needs of schools in their areas. I sympathize with the concerns of District #58 and I, like the County Superintendent, must encourage further meetings and further cooperation between District #44 and District #58 so that they might function with more harmony towards their common goals.

The District #58 trustees also cite 20-10-132(3) MCA, in support of their request. I believe that this section of law only applies to a transfer of a bus route and since we are speaking only of existing bus routes, subsection (3) will not come into effect. With regard to District #58 concerns about charges for riding school buses, again the County Superintendent has correctly cited Section 20-10-122 MCA which provides discretion in the assessment of school bus costs and provisions of transportation to ineligible transportees.

The District #58 trustees have very real and sincere concerns about the vitality of their schools, and I hope that they might work within this framework and with the trustees of District #44 toward a resolution which will in part satisfy the concerns of each district.

My office is always open to facilitating such discussions, and I am more than willing to make my own time, as well as that of any member of my staff, available for informally resolving problems between school districts in the area of transportation.

District #58 might also seek resolution of this matter before the legislature, but I would recommend that only if negotiations and reason fail.

Based on the foregoing, the decision of the County Transportation Committee dated November 10, 1982 is hereby affirmed.

DATED May 19, 1983.

BEFORE THE STATE OF MONTANA
SUPERINTENDENT OF PUBLIC INSTRUCTION
****

MR. and MRS. DUSTY GILGER Boyes, Montana, Appellants, vs. SCHOOL DISTRICT 79J, POWDER RIVER COUNTY, BROADUS, MONTANA, Respondent.	)	DECISION AND ORDER OSPI 49-83

****

This is an appeal by Mrs. and Mrs. Dusty Gilger of Boyes, Montana, from the Decision and Order of the Powder River County Transportation Board which was undated, but which appears to have been signed by the Board on May 15, 1983.

A meeting was held before County Superintendent Don Bidwell on May 5, 1983. A transcript was prepared. A letter from County Superintendent Bidwell indicates that all members of the County Transportation Committee were present at the hearing on May 5, 1983. On May 15, 1983, a vote was taken not to reverse the Board's decision on the transportation route requested by the Gilgers.

The standards of review which I have adopted on transportation matters as well as the contested cases coming before me are set forth in Section 2-4-704 M.C.A. That statute provides:

> (1) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency not in the record, proof thereof may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.
>
> (2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have

been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
> (g) because findings of fact, upon issues essential to the decision, were not made although requested.

See also Yanzick v. School District No. 23, ____Mont.____, ____ 39 St. Rptr. 191 (1982).

The membership of the County Transportation Committee is set forth in 20-10-131 M.C.A. The duties of the County Transportation Committee are found in 20-10-132 M.C.A.

The duties of the State Superintendent in this appeal are set forth in 10.6.125 ARM, which provides as follows:

> ... The state superintendent may affirm the decision of the (county transportation committee) or remand the case for further proceedings or refuse to accept the appeal on the grounds that the state superintendent fails to retain proper jurisdiction on the matter. The state superintendent may reverse or modify the decision if substantial rights of the Appellant have been prejudiced because the findings of fact, conclusions of law and order are (in part):
>
> > (a) in violation of constitutional or statutory provisions
> > (c) made upon unlawful procedure
> > (d) affected by other error of law...

The findings of fact of the County Transportation Board are as follows:

> 1. That Mr. and Mrs. Dusty Gilger are residents of District 79J with a child who will attend grade one for the 1983-84 school term.

2. That on Februray 14, 1983, at a Board meeting of the trustees of District 79J, the Gilgers did request a change in the bus route which serves their area in Powder River County, Montana.

3. That on March 14, 1983, at a regular meeting, the trustees of District 79J, Powder River County, Montana, denied the request for bus route revision.

4. That on March 25, 1983, Mr. and Mrs. Gilger filed an appeal of the decision of the trustees with Donald L. Bidwell, Chairman, Powder River County Transportation Committee.

5. That on May 5, 1983, an appeal was heard before the Powder River County Transportation Committee at which time both parties presented sworn testimony.

6. That 20-10-121 MCA does obligate a board of trustees to provide transportation by bus or individual transportation.

7. That the mileage of the Gilger requested route was 5.2 miles greater than the present route as determined by measurement by Les Thompson, Highway Patrolman.

8. That the cost of the Gilger requested route would be greater by $3,380.90 than the cost of the present route.

9. That the present condition of 6.8 miles of the Gilger requested route is unimproved.

10. That the two routes in question will provide bus transportation for an equal number of students.

Finding number 8 appears to be contradicted and opposed by the Gilgers in their findings which were submitted to the State Superintendent.

Specifically the Gilgers contend that:

> 6. The cost of the requested route is greater at present because the parents are absorbing the transportation costs to the route "the present route requires all parents to provide extra transportation, except those living at the Moore Ranch."
>
> 8. The present route will be costly to those having to provide transportation to it in the future.
>
> 10. In conclusion, the proposed bus route would serve the present and future needs with less individual transportation and expense.

A full review of the record indicates some testimony by a member of the Transportation Committee, Mrs. Carter, beginning on page 28 of the transcript discussing an additional cost of $5,460.13, which would be presumably for the new route.

However, finding of fact number 8 indicates that that increased cost is $3,380.90. There is no other basis in the transcript for that finding of fact and no indication of any stipulation or agreement between the parties that that cost was accepted or agreed to by all parties.

The cost of rural bus routes to the school districts and counties are relevant and should be considered by transportation committees. Further, it would seem that input from county commissioners as to their ability to improve or construct additional miles of roadway for the transportation route would be relevant to the discussion before this Transportation Committee.

This finding need not require much additional expense or delay. The parties could agree to figures by stipulation as they did with the Highway Patrolman traveling the route. They could also agree to accepting statements in writing or affidavits from the County Commissioners concerning the ability to upgrade the roads and to construct new roads for new bus routes.

In the transcript, there is a discussion of a nonexistent or old road, which the Appellants propose to have opened with the County Commissioners. I believe that information from the Commissioners as well as a clear discussion of the increased costs would provide a more sound basis for the decision of the County Transportation Committee. Copies of the guidelines from the state office should be useful to both sides at the next hearing.

Rural school bus routes are vital to the efficient functioning of many of our school districts. The County Transportation Committee should take into account not only the location of roads, but also location of students and children. By directing a rehearing before the local County Transportation Board, I am not trying to force any particular route on the local school district or the county. I am, however, seeking a fuller and more complete discussion of the issue which was presented by this appeal in hearing. I do not think each side requires a lawyer. I do not think that much additional time need be spent if agreement can be reached. However, I do believe that the informal atmosphere which was present at the first hearing is useful in reaching a decision. The informal

discussion must make available the relevant evidence and concerns necessary to reach a decision. I have articulated two additional matters which should be discussed. If both sides are more fully aware of all the facts that go into the final decision, a more acceptable resolution may be found and more understanding may be reached rather than more disputes growing out of such a process.

In accordance with the foregoing decision, it is hereby ORDERED that the decision of the Powder River County Transportation Committee be vacated and the matter is remanded for a rehearing in accordance with the guidelines and directions set forth in this decision.

DATED this 27th day of October, 1983.

BEFORE THE STATE OF MONTANA
SUPERINTENDENT OF PUBLIC INSTRUCTION
****

WANDA KIRN and JACKIE GRAINGER, Appellant, -vs- POPLAR SCHOOL DISTRICT #9 ROOSEVELT COUNTY TRANSPORTATION COMMITTEE, Respondent.	OSPI 34-82 DECISION AND ORDER

****

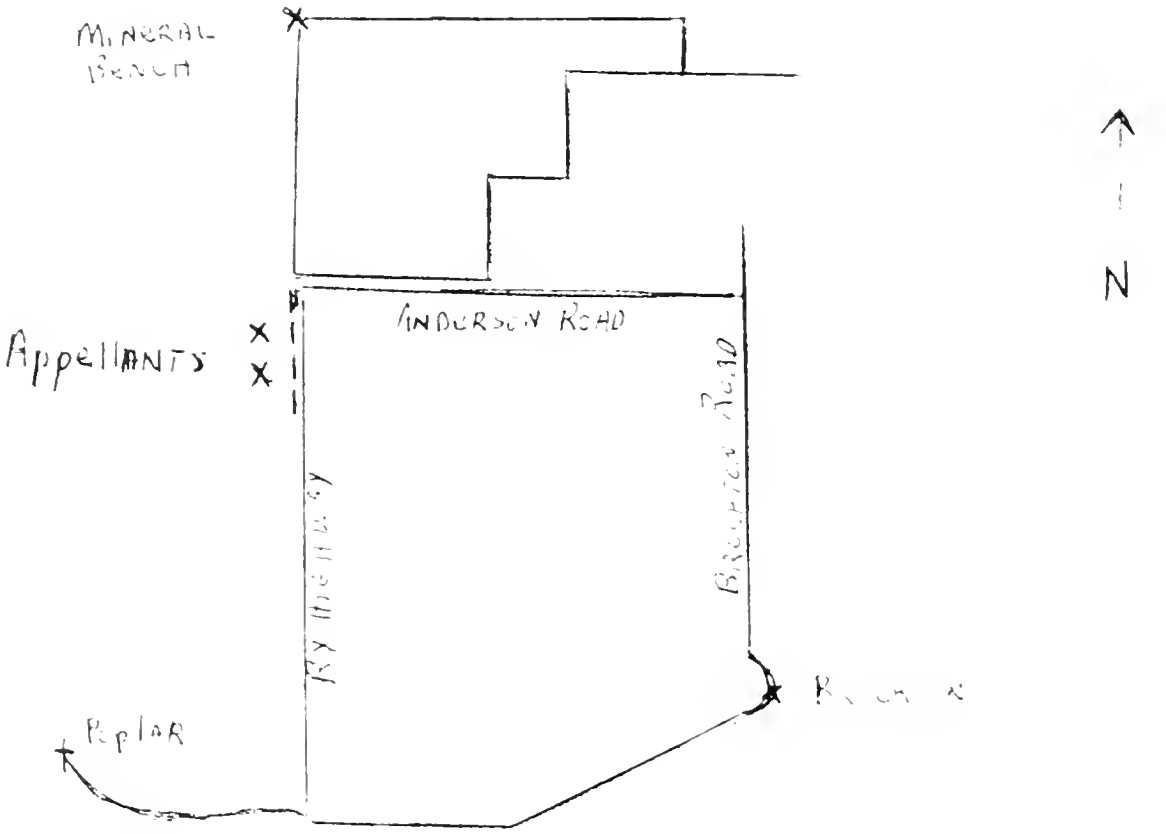
This is an appeal from the findings of fact, conclusions of law and order rendered by the Roosevelt County Transportation Committee which was prepared by the Chairman of the Roosevelt County Transportation Committee, the Roosevelt County Superintendent of Schools, affirming the Poplar District Board of Trustees' Decision denying Appellant's request for a change in bus route.

Appellants requested that the Poplar District Board of Trustees change the bus route in order to pick up and transport their children to the Mineral Bench School, which is north of the Poplar School District. The Superintendent of Poplar School District #9, Mr. Jack Kober, wrote a letter to Appellant Kirn and stated that the requested change had been denied and that the next regular school board meeting for an appeal would be July 12, 1982.

On August 9, 1982 the Poplar Board of Trustees, meeting in regular session, reconsidered the bus extension request of Appellants. The Board of Trustees once again denied the request to change the bus route. On August 12, 1982 Appellant Kirn and Grainger appealed the decision of the Poplar Board of Trustees to the Roosevelt County Transportation Committee. The appeal was filed with the County Superintendent of Schools requesting a hearing under Section 20-10-132 (d) MCA.

The County Transportation Committee conducted a hearing on September 17, 1982 regarding the requested extension, and the decision of the Board of Trustees of

Poplar School District #9 was affirmed. For purposes of clarification a map of this area is provided herein.



At the hearing, Appellants raised the following reasons for their request for an extension of the bus route. They stated that Wesley Kirn would be in kindergarten during the current year and would attend Mineral Bench School. Brad Grainger, also a son of Appellant, would be attending Mineral Bench School as a second grade student. The Anderson road is the southern boundary of the Mineral Bench bus route. The Kirn residence is one mile

south of this route. "RY" highway and Appellent Grainger are approximately another one-half mile south.

Appellants argued that, because of their children's ages, it would be very inconvenient for them to send their children to the Poplar School District, whereas Mineral Bench kindergarten would be every other day and would allow the children to ride the bus to and from school. Further, Appellants indicated they would have additional children next year and would continue to face this transportation problem.

Appellants argued that the Mineral Bench School is "somewhat closer" to their homes and that the bus route extension would better meet their needs. They asked the County Transportation Committee to reverse the Board.

The Board of Trustees of Poplar School District stated that, while they did not deny Appellants permission to send their children to Mineral Bench School or to Poplar, they felt that a precedent would be set by sending the shuttle bus from the turn off to the Appellants' residences. Poplar School Board argued that regular bus route #3 passes the shuttle bus at the Anderson turnoff and goes by the residences of the two Petitioners, then south to the Poplar School. The Board of Trustees further argued that there would be a duplication of services by allowing two school buses to travel the same bus route. The Board of Trustees also argued that it would not cause an undue hardship on either Appellant to have them transport their children from their residences to the Anderson road to meet the shuttle bus.

The case before the Transportation Committee was conducted without the benefit of counsel for either party. A reading of the transcript indicates that the information necessary to resolve the dispute was presented to the County Transportation Committee on an informal basis. Further, neither Appellants nor Respondents have had the benefit of counsel in presenting the appeal to the State Superintendent, nor were written briefs submitted to this State Superintendent.

Appellant argues that to drive the school bus an additional 1½ to 2 miles would not be that great a distance off the bus route to the Mineral Bench School. Petitioners argue that their kindergarten child attends Mineral Bench School every other day and that it would be a great inconvenience for the Appellants to transport their children to meet the shuttle bus which transports their children to the Mineral Bench school. If the Mineral Bench school bus came down the route as requested, the children would be living within one-half mile of the school bus and could walk to the school bus from home.

During the hearing the school district agreed with the statements of the parents. However they argued that a change would create a duplication of services which is a problem "we always run into whenever the transportation committee meets." The school board argued that the requested change was not realistic and not feasible from an economic standpoint. The Board of Trustees also expressed an understanding of the fact that if the kindergarten students had to attend the half-day kindergarten in Poplar, it would mean that the child would either have to be picked up at noon or brought to town separately from the bus-transported children. The every other day kindergarten schedule at Mineral Bench would be advantageous to the Appellants. Respondent Board of Trustees also indicated that it does not dispute the fact that Appellants could send their children to the Mineral Bench School. The Board of Trustees did not agree that it should have to provide the bus service which would be a duplication of services.

Respondents argued that if the school district started running two buses over the same route in order to accommodate some youngsters, it would have to do the same for students throughout the county.

In the Notice of Appeal filed with this office, Appellants present two issues, summarized below:

1. Whether the County Transportation Committee erred in allowing the Poplar Board of School Trustees to present a reason for the bus route denial that had not been pre-

viously explained to Appellants. Appellants argue that raising the "duplication of services" argument before the County Transportation Committee did not provide Appellant the ability to respond to the argument at the hearing and as such was error.

2. Whether the District Superintendent of the district involved in a controversy may sit and vote as a member of the County Transportation Committee. Appellants argue that Section 20-10-131 (2) requires only five members to satisfy the minimum requirements for the County Transportation Committee to conduct such a hearing.

Concerning the first issue, the Rules of Procedure for all School Controversies provide that a controversy such as this is a determination of the legal rights, duties or privileges of a party (see Section 10.6.102 ARM). Once a controversy begins, it is the responsibility of all parties to be prepared for the hearing. One such means of preparing for the hearing is the use of discovery rules. The discovery rules in the Rules of Controversy are found in Sections 10.6.109 through 10.6.113. Discovery means the ability to find out what the other party will present at the hearing stage. Section 10.6.111 ARM states in part:

> (1) Unless otherwise limited by order of the county superintendent, the scope of discovery is as follows:
>
> (a) in general, parties may obtain discovery regarding any matter not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible items and the identity and location of persons having knowledge of any discoverable material;
>
> (b) a party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for hearing.

The issue of inability to determine what will be presented at a hearing was presented in another case, Alhquist et al. v. School District #2, Yellowstone County

et al., Cause No. DV-82-887. The District Court Judge ruled that the discovery method was available to all parties and that if a party failed to use such discovery method and one party presents information at the hearing, then this is not error on the part of the County Transportation Committee. In this case, the Superintendent of Poplar School District raised the issue of duplication of services. It is Appellants' contention that the duplication of service issue was not raised at the Board of Trustees' hearing. Although the State Superintendent cannot comment on the use of such information, not disclosed before the hearing, it finds no error on the part of the County Transportation Committee in considering such information in its findings of fact, conclusions of law and order. All parties have the opportunity to discover what the party will say prior to any hearing through the use of the discovery rules, found in the Rules of Procedure for all School Controversy Contested Cases.

The second issued raised by the Appellants in this case is that the District Superintendent voted on the matter as a member of the County Transportation Committee.

Section 20-10-131 states:

> County transportation committee membership. (1) To coordinate the orderly provision of a uniform transportation program within a county under the transportation law, board of public education transportation policies, and the transportation rules of the superintendent of public instruction, there shall be a county transportation committee created in each county of the state of Montana. The membership of the county transportation committee shall be:
>
> (a) the county superintendent;
>
> (b) the chairman of the board of county commissioners or a member of such board designated by the chairman;
>
> (c) a trustee or district employee designated by the trustees of each high school district of the county;
>
> (d) one representative from each high school district of the county who is a trustee of an elementary district encompassed within the high school district and who has been selected at a meeting of the trustees of such elementary districts; and
>
> (e) a representative of a district of another county when the transportation services of such a

district are affected by the actions of the transportation committee, but such a representative shall have a voice only in matters affecting transportation within such district or by such district.

(2) The county transportation committee shall have at least five members, and if this minimum membership cannot be realized in the manner prescribed in subsections (1)(a) through (1)(d) above, the county superintendent shall appoint a sufficient number of members to satisfy the minimum membership requirement.

(3) The county superintendent shall be the chairman of the county transportation committee, and a quorum shall consist of a majority of the membership. The county transportation committee shall meet on the call of the chairman or any three members of such committee.

Section 21-10-132 states:

Duties of the county transportation committee. (1) It shall be the duty of the county transportation committee to:

(a) establish the transportation service areas within the county, without regard to district boundary lines, which will define the geographic area of responsibility for school bus transportation for each district that operates a school bus transportation program;

(b) approve, disapprove, or adjust the school bus routing submitted by the trustees of each district in conformity with the transportation service areas established in subsection (1)(a);

(c) approve, disapprove, or adjust applications, approved by the trustees, for increased reimbursements for individual transportation due to isolated conditions of the eligible transportee's residence; and

(d) conduct hearings to establish the facts of transportation controversies which have been appealed from the decision of the trustees and act on such appeals on the basis of the facts established at such hearing.

(2) After a fact-finding hearing and decision on a transportation controversy, the trustees or a patron of the district may appeal such decision to the superintendent of public instruction who shall render a decision on the basis of the facts established at the county transportation committee hearing.

(3) The trustees of any district which objects to a particular school bus route or transportation service area to which it has been assigned may request a transfer to another school bus route or transportation service area. The county transportation committee may transfer the territory of

> such district to an adjacent district's transportation service area or approved school bus route with the consent of such adjacent district. When the qualified electors of the district object to the decision of the county transportation committee and the adjacent district is willing to provide school bus service, 20% of the qualified electors, as prescribed in 20-20-301, may petition the trustees to conduct an election on the proposition that the territory of such district be transferred for school bus transportation purposes to such consenting, adjacent district. When a satisfactory petition is presented to the trustees, the trustees shall call an election in accordance with 20-20-201 for the next ensuing regular school election day. Such election shall be conducted in accordance with the school election laws. If a majority of those voting at such election approve the transfer, it shall become effective on July 1 of the ensuing school fiscal year.
>
> (4) Unless a transfer of a district from one transportation service area or approved school bus route to another such area or route is approved by the county transportation committee and the superintendent of public instruction, the state transportation reimbursement shall be limited to the reimbursement amount for school bus transportation to the nearest operating public elementary school or public high school, whichever is appropriate for the affected pupils.

A close examination of both statutes indicates that the membership of the county transportation committee is mandatory. The District Superintendent represented the high school district of the county and therefore fulfilled the capacity of subsection c of section 20-10-131 of Montana Codes Annotated. It appears that the intent of the legislature was to allow the County Transportation Committee to be made up of several members, including the individual district in which the transportation dispute arises. In other words, the party in a controversy may very likely also be represented on the County Transportation Committee. In most instances and in all the cases which have come before this State Superintendent this has been the case. This situation cannot be avoided. Therefore, in the absence of a direct statutory prohibition, an individual or a district representative who is a Respondent or an Appellant in a County Transportation

Controversy may also sit on the transportation committee and vote on all matters. This State Superintendent finds no error in allowing a member of the County Transportation Committee to also represent a district. The County Transportation Committee is made up of at least five members, and those five members would provide sufficient check on one vote which might be adverse to the appealing party.

Under the Rules of Controversy and the Standards of Review on the Appellate Procedure of Standard of Review set out in 10.6.125 of the Administrative Rules of Montana, the State Superintendent may not substitute his judgment for that of the County Transportation Committee as to the weight of the evidence on question of fact.

> The State Superintendent may affirm the decision of the County Transportation Committee or remand the case for further proceedings or refuse to accept the appeal on the grounds that the State Superintendent fails to retain proper jurisdiction on the matter. The State Superintendent may reverse or modify the decision if substantial rights of the Appellant have been prejudiced because the findings of fact and conclusions of law and order are
> (a) in violation of constitutional or statutory provisions
> (b) made upon unlawful procedure
> (c) affected by other error of law.

This State Superintendent finds no irregularities in procedure substantial enough to prejudice the Appellant's rights or to require a reversal of the County Transportation Committee.

This State Superintendent does recommend, however, that the County Transportation Committee examine future transportation service areas in light of affected residences. All parties to this appeal are to be complimented on the manner in which they acted at the hearing before the County Transportation Committee. Although relief is not granted to the Appellant in this action, they are to be complimented for their efforts in attempting to resolve the matter with the Board of Trustees and the County Transportation Committee. Perhaps alternative scheduling

for the elementary students, both at Poplar School District #9 and Mineral Bench School District, may be resolved at the local level. This State Superintendent sympathizes with individuals in rural areas and with school boards attempting to provide transportation services to those areas. The geographic area and distances of Montana require close cooperation between neighboring school districts in order to provide services to rural Montanans.

The County Transportation Committee findings of fact, conclusions of law and order are affirmed.

DATED this 29th day of April, 1983.

BEFORE THE STATE OF MONTANA
SUPERINTENDENT OF PUBLIC INSTRUCTION
****

MILO & DEBBIE LAMPHIER, Rte. 2, Box 2353, Sidney, MT 59270, et al., Appellants
-vs-
JOAN A. RITTER, Richland County Superintendent, et al., Respondent

MEMORANDUM OPINION

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On May 3, 1983 the Richland County Transportation Committee held a hearing in the above-entitled matter and following the hearing submitted the issue to a vote. The decision of the Transportation Committee was to deny the Appellant's request for a change in the school bus route. A copy of a Decision and Order was received by the State Superintendent on May 23, 1983. That Decision was dated May 17, 1983 and signed by the County Superintendent who is also chairman of the Richland County Transportation Committee, Joan Ritter.

On June 1, 1983, the attorney for the Appellants filed a Notice of Appeal with the State Superintendent citing, among other grounds, the fact that no findings of fact were issued. It appears from the outset that findings of fact, conclusions of law and an order were issued; however, they were not served in accordance with the Administrative Rules of Montana. Appellants were not prejudiced because the decision was timely filed. They were eventually provided with an unsigned copy of the findings and order which was attached to the brief submitted August 1, 1983 by the Deputy County Attorney for Richland County. In Appellant's Reply Brief, Appellant's attorney does raise the issue of prejudice in such a delay in receiving the Decision and again has attacked the form of the findings under the Administrative Rules of Montana.

The issue presented by this appeal relates both to the legal sufficiency of the findings and order of the

Transportation Committee as well as the legal standard used by the Transportation Committee in denying the change in the bus route to eligible transportees.

The record reflects that approximately 66 eligible and 18 ineligible transportees ride the subject bus. Appellants are parents of four children who ride the bus. The distance from their homes to the bus stop is between .7 and .8 of a mile. The parents have requested the Transportation Committee to adjust the bus route to provide that their children be picked up nearer their homes. This request was denied by the School District Transportation Committee, and the appeal to the County Transportation Committee was followed with a hearing on May 3, 1983. The committee's order upholds the decision of the Sidney School Board against an extension of the bus route. It is the conclusion of the Richland County Transportation Committee that Appellants are not being denied bus service. Appellants argue through their attorney that the failure to extend bus service amounts to a denial, at least in part, of bus service.

Transportation is defined by Section 20-10-101 MCA to mean "a district's conveyance of a pupil by a school bus between his legal residence and the school designated by the trustees for his attendance."

Further, Section 20-10-121 MCA provides:

> The trustees of any district may furnish transportation to an eligible transportee who attends a school of the district or has been granted permission to attend a school outside of the district. Whenever the trustees of a district provide transportation for any eligible transportee, the trustees must provide all eligible transportees of the district with transportation. The trustees shall furnish transportation when directed to do so by the county transportation committee and such direction is upheld by the superintendent of public instruction.

Section 20-10-121(4) also provides:

> When the parent or guardian of an elementary pupil consents to a trip of over 1 hour, the trustees may require such eligible transportee to ride a school bus for more than 1 hour per trip.

It is clear from the record, although not from the findings, that the children involved here are eligible transportees within the meaning of the statute. Each of them appears to live in excess of four miles from the nearest school. The record and the decision reflect that they must walk or be transported between .7 and .8 of a mile from the existing bus route to their homes.

The committee's decision states the basis for the Sidney School Board's decision as one of safety. The County Transportation Committee found that the road had several switch-back turns and a gorge through to the edge. The pictures presented to the committee indicate the road to be paved. The testimony of the Deputy Sheriff and county road crew indicates that there is no particular hazard along this road, although one of the parents testified to an incident where the children were walking along this road and were met by cars going each way, causing concern for their safety to at least one of the drivers. The board does not make an explicit finding that the particular road in question is unsafe. It questions whether seeking absolute guarantees of sanding and maintenance during hazardous winter weather are genuine concerns. These concerns, however, are shared by every district and county transportation committee in this state, and they relate not only to local and county roads, but also to state highways.

However, there is a portion of Montana law found in 20-10-142 which provides for the transportation of an eligible transportee to a school bus stop and provides for reimbursement of that travel if it is in excess of 3 miles round trip from the bus stop. See 20-10-142(2) MCA.

The testimony concerning safety provided by the attorney for the Appellants indicates that it probably would not only be safe for the school bus, but that it would be safe for transporting the children by car to the stop.

It may be time for the legislature to review these mileage distances for transportation to and from school bus stops; but, at present, I must follow the law.

To be sure, the final decision of the County Transportation Committee could be more formally structured. Although there are findings and a conclusion of law, I do find that the findings relating to safety are insufficient and not supported by the record; but, in view of 20-10-121 and 20-10-142 MCA and the record, I will modify the decision of the County Transportation Committee to find that such road is safe for transporting children either by bus or by private transportation and that, as a matter of law, transportation within 3 miles round trip of a bus stop for eligible transportees is not required by state law.

I would hope that, in the future, decisions of the County Transportation Committee are mailed promptly to all parties. Since no prejudice was actually suffered in this instance, the error does not require a rehearing or other delay. Therefore, the decision of the County Transportation Committee as modified by this decision is affirmed.

DATED this 15th day of December, 1983.

BEFORE THE STATE OF MONTANA

SUPERINTENDENT OF PUBLIC INSTRUCTION

****

FRENCHTOWN SCHOOL DISTRICT NO. 40 Appellant, v. LEWAYNE SCHUTTER, GUARDIAN FOR DAVID RIDENHOUR, Respondent.	)	DECISION AND ORDER OSPI 41-83

****

Appellant, Frenchtown School District No. 40, has appealed a decision of the Missoula County Superintendent of Schools, dated February 17, 1983. The County Superintendent held that: 1) the appointment of LeWayne Schutter as legal guardian of David Ridenhour has made the residence of David Ridenhour that of his guardian; 2) David Ridenhour is a resident of Frenchtown School District No. 40 and is not required to pay tuition; 3) Appellant's residency policy is not inconsistent with the intent of state and federal law.

This matter was submitted on briefs. Briefs have been received from Appellant and Respondent.

In the Notice of Appeal, Appellant contends: (1) that the school district "has the authority to establish residency requirements for its students (see Section 20-3-324(3) MCA)." Such residency requirements are to be based upon Montana's residency statute (see Section 20-5-304(1) and Section 20-5-101 MCA); (2) the determination that the residency of David Ridenhour is that of his mother, who resides in California; (3) the Appellant's School District's residency policy is correct and urges this State Superintendent to approve the same.

This appeal is subject to the standards of review set forth in Section 10.6.125. That Section provides as follows:

"(4) The state superintendent may not substitute his judgement for that of the county superintendent as to the weight of the evidence on questions of fact. The state superintendent may affirm the decision of the county superintendent or remand the case for further proceedings or refuse to accept the appeal on the grounds that the state superintendent fails to retain proper jurisdiction on the matter. The state superintendent may reverse or modify the decision if substantial rights of the Appellant have been prejudiced because the findings of fact, conclusions of law and order are:

(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(d) affected by other error of law;
(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
(g) because findings of fact upon issues essential to the decision, were not made although requested."

The basic issues arising from this appeal deal with the powers and duty of the School Board to determine residency and to what extent those powers and duties are limited by statute and/or State and Federal Constitutions.

Appellant, in the spring and fall of 1982, adopted an amended policy, binding resident students to include:

"One who is living with a grandparent, brother, sister, aunt or uncle who is a court ordered legal guardian and actually resides in Frenchtown School District No. 40."

Another exception was made for:

"One who is placed with a resident adult who actually resides in School District No. 40 by a governmental entity or in an agency licensed by a governmental entity."

The student David Ridenhour has attended Frenchtown's School District since September, 1978. In Missoula County District Court, Cause No. A-14059, a legal guardian for

David Ridenhour was appointed by the District Court on September 11, 1981. The guardian is not a blood relative.

The student's mother resides in California. The student's father resides in Alberton School District, Missoula County.

During the hearing before the County Superintendent, one of the members of the Board of Trustees testified that the reason for the tuition limits to blood legal guardians was a concern for an influx of students as a result of a strike in other high school districts of Missoula County. (Tr., 47) Another explanation was offered by the Superintendent of Frenchtown Schools saying that "family groups are stronger." (Tr., 105)

The record also indicates that another student attending Appellant School Districts resided with a guardian but one who was a blood relative within the policy's definition.

From the record it is evident that the requirement that Student Ridenhour pay a tuition is based exclusively on the policy adopted by the Board of Trustees and not any factual residence question.

I have before me the question of a bona fide residency requirement in the field of public education. The specific policy in question creates an irrebuttable presumption that one who resides with a non-blood legal guardian is a nonresident for high school tuition purposes.

The United States Supreme Court has on several occasions discussed the issue of such requirements. A Connecticut statute was invalidated in the case of Valandis v. Kline, 412 U.S. 441 (1973) because it violated the due process clause by classifying some bona fide state residents as nonresidents for tuition purposes. The Supreme Court recognized the general right of protecting bona fide residents. More recently in the case of Pyler v. Doe, 457 U.S. ____ (1982), a Texas statute was partially invalidated because it excluded undocumented alien children from

free public schools. The Court recognized the School District's right "to apply...established criteria for determining residence." Recently in Martinez v. Bynum, 51 Law Week 4524 (1983) the United States Supreme Court upheld a Texas residency statute which required students to have a bona fide intention to remain in the school district indefinitely and to make his home in the district. The statute also provided that the student's presence in the school district is not for the primary purpose of attending the public free schools. The Court said of this requirement:

> "A bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring the services provided for its residents are enjoyed only by residents. Such a requirement with respect to attendance and public free schools does not violate the equal protection laws of the Fourteenth Amendment... a bona fide residence requirement simply requires that the person does establish residence before demanding the services that are restricted to residents."

The Court noted that it would apply the "rational basis" test to weigh the bona fide residency requirement. Under the Federal Constitution public education is not a fundamental right granted to individuals. However, Article X, Section 1(3) of the 1972 Montana Constitution provides:

> "The legislature shall provide a basic system of free quality public elementary and secondary schools."

Thus the right under Montana Constitution to a free quality public education is a fundamental state constitutional right. In the instant policy, I must look to the rational basis for allowing blood relative guardians to have their charges educated at no cost while non-blood relative guardians are required to pay tuition such as in Appellant School District.

The basis for the distinction as noted above arose out of the threat of other county children taking advantage of the facilities in Appellant School District. In the instant case, Student Ridenhour has been a student of the school district since 1978. He was not required to pay tuition until the fall of 1982. At the same time another student will be allowed to attend the Appellant School District because she resides with her grandmother.

For both students the questions are: Does this requirement test whether or not they are actually physically present in the school district and are their intent to remain there? The facts indicate that such is the case for both these students and their guardians. The only difference is that the student with the blood relative guardian is given preference over the one with the non-blood relative guardian. Such criteria fails under both the state and federal equal protection guarantees as well as the Montana guarantee of a free public education. The school district has the authority to establish residency requirements under Peterson v. School Board, et al., 73 Mont. 442, 236 P. 670 (1925), 20-5-101, 20-3-323, and 20-3-324 MCA. That authority cannot contravene either or both the federal and state constitution. A tuition policy that relied on the Texas statutory language of Martinez would pass muster under both documents.

Because the decision of the Missoula County Superintendent of Schools has correctly invalidated the tuition policy of Appellant School District and because that action is supported by the state and federal constitution, the decision is hereby affirmed and Appellant is ordered to refund any tuition payments to Student Ridenhour forthwith.

DATED July 26, 1983.

BEFORE THE STATE OF MONTANA
SUPERINTENDENT OF PUBLIC INSTRUCTION
****

IN THE MATTER OF THE APPEAL OF)
) MEMORANDUM OPINION
PETRONELLA SPOTTED WOLF) OSPI 52-83
****

This appeal arises out of a denial by the Glacier County Transportation Committee of a room and board contract for the 1982-83 school year. Originally this matter was before the State Superintendent under OSPI No. 39-82 but pursuant to a stipulation, the parties rescheduled a hearing before the Transportation Committee. That hearing was held on May 26, 1983. Following that hearing the County Transportation Committee issued its Decision and Order on June 7, 1983. This matter arises from the same factual background as that encompassed in our Decision in the same matter rendered August 31, 1981. See In the Matter of the Appeal of Petronella Spotted Wolf, OSPI 3-81.

The Appellant has received a room and board contract from the County Transportation Committee since 1973. For school year 1980-81 the Appellant's room and board contract was denied by the County Transportation Committee and became the subject of the August 31, 1981, decision by the State Superintendent which reinstated her contract for that school year. For school year 1981-82 the trustees of School District No. 9 refused to issue a room and board contract to the Appellant and an appeal was made to the Glacier County Transportation Committee. On May 7, 1982 the Glacier County Transportation Committee reversed the decision of the school district and ordered the room and board contract restored for the 1981-82 school year.

Then for the 1982-83 school year Appellant again applied and was denied a contract by the school district and following hearing on May 26, 1983, the County Transportation Committee issued its order denying the room and

board contract. The appeal of that decision is now before me.

Under the rules of controversy which I have adopted for the conduct of hearings by county transportation committees and county superintendents the standard of review which I use is patterned after the Montana Administrative Procedure Act in Section 2-4-704 MCA. That standard of review provides:

> 2-4-704. Standards of review. (1) The review shall be conducted by the court without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the agency not shown in the record, proof thereof may be taken in the court. The court, upon request, shall hear oral argument and receive written briefs.
>
> (2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) affected by other error of law;
> (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
> (g) because findings of fact, upon issues essential to the decision, were not made although requested.

Section 20-10-142(3) sets out "excessive distances, impassable roads, or other special circumstances of isolation" as grounds for increased reimbursement rates. Section 20-10- 142(4) provides:

> "When the isolated conditions of the household where an eligible transportee resides require such eligible transportee to live away from the household in order to attend school, he shall be eligible for the room

> and board reimbursement. Approval to receive the room and board reimbursement shall be obtained in the same manner prescribed in subsection (3) above. The per diem rate for room and board shall be $5 for one eligible transportee and $3 for each additional eligible transportee of the same household.

The decision of the Glacier County Transportation Committee notes that the road upon which the children must travel is not maintained and the decision and record are devoid of any controverting evidence to deny the assertions of the appellant that the Appellant is snowed in without a vehicle and unable to transport the children to the bus stop some 1.4 or 1.6 miles away. It has been the Appellant's practice to move into town every winter because of the condition of this road.

As indicated in my Decision of August 31, 1981, I believe that since this contract had been awarded for seven or eight years based upon isolated conditions that new special circumstances or changed conditions would have to be shown in order to now revoke that contract. Surely, Appellant's room and board contract was not guaranteed. Appellant had to apply for it every year. It had to be reviewed by both local and state officials; but to simply deny it because of conditions which are now interpreted as not being isolated, when before for many years they were interpreted as being isolated, really does away with any guidelines or any criteria or objective standards to make the award of such a contract. At the same time I believe the Glacier County Transportation Committee and the Superintendent of Glacier County are trying to administer this program in the best way possible. In other decisions concerning isolation, I have not been bound to a strict mileage rule in order to determine isolation. That is a criteria which must be viewed in light of the local circumstances. Here, the record is absolutely clear that for over seven years her situation was viewed as isolated. Hindsight by new officials may view that determination as an error, but absolutely no new evidence concerning isolation has been submitted to me.

To be sure there is the danger that once a room and board contract is granted, it must always be granted, but there has been absolutely no effort made to determine how many days of the year that road is open, how many months Mrs. Spotted Wolf resides in Browning, how many trips she makes out to her home near Heart Butte or the markings on the roads or other landmarks which would be useful in walking to the bus stop during the dark early morning hours or dark evening hours. These issues are ripe for review in the future if there is evidence of changed circumstance.

It is quite evident that the County Superintendent and the Transportation Board feel that I am second-guessing them on this matter; I am not. It is the record which this County Transportation Committee made for the past seven years which it must now overturn. There was no evidence of what kind of mistake or criteria was used in the past which was erroneous; and, therefore, any decision by the County Transportation Committee in this matter must have some basis in fact and in the record. It cannot be arbitrary or changed each time the complexion of the Transportation Committee changes. Even this State Superintendent is bound by law. This State Superintendent cannot arbitrarily change the law to fit individual facts.

Therefore, the decision of the Glacier County Transportation Committee is reversed and the committee is directed to award Petronella Spotted Wolf a room and board contract for the 1982-83 school year forthwith.

DATED this 21st day of December, 1983.

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